(27,024)

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1919.

No. 330.

NNSYLVANIA GAS COMPANY, PLAINTIFF IN ERROR,

vs.

BLIC SERVICE COMMISSION, SECOND DISTRICT, OF THE STATE OF NEW YORK, THE CITY OF JAMESTOWN, EW YORK, ET AL.

RROR TO THE SUPREME COURT OF THE STATE OF NEW YORK.

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In the Court of Appeals of the State of New York.

In the Matter of the Application of PENNSYLVANIA GAS COMPANY, Appellant, for a writ of prohibition, directed to the Public Service Commission, Second District, of the State of New York, and to Alfred C. Davis, the City of Jamestown, and Others, Respondents, complainants in a proceeding pending before said Commission entitled: In the Matter of the Complaint of Alfred C. Davis and Others, of Jamestown, N. Y., under Section 71 of Public Service Commissions Law, against Pennsylvania Gas Company, as to price of Natural Gas charged to private consumers, Case No. 6040.

Record on Appeal.

Fisher & Fisher, Attorneys for Relator, Appellant, 501-4 Wellman Bldg., Jamestown, N. Y.
Hon. Ledyard P. Hale, Counsel for Public Service Commission, Respondent, Albany, N. Y.
Thrasher & Clapp, Attorneys for Alfred C. Davis and others, Respondents, 504 Fenton Bldg., Jamestown, N. Y.
Chester A. Price, Corporation Counsel, City of Jamestown, Respondent, Jamestown, N. Y.
Louis L. Thrasher, Special Counsel for City of Jamestown.

Notice of Appeal to Court of Appeals.

COURT OF APPEALS,
State of New York:

In the Matter of Application of PENNSYLVANIA GAS COMPANY, Appellant, for a Writ of Prohibition, Directed to the Public Service Commission, Second District, of the State of New York, and to Alfred C. Davis, the City of Jamestown, and Others, Respondents, Complainants in a Proceeding Pending Before said Commission entitled: "In the Matter of the Complaint of Alfred C. Davis and Others, of Jamestown, N. Y., under Section 71 of Public Service Commissions Law, against Pennsylvania Gas Company, as to Price of Natural Gas Charged to Private Consumers, Case No. 6040."

GENTLEMEN: Please take notice, That the Pennsylvania Gas Company, the relator in the above-entitled proceeding, hereby appeals to the Court of Appeals from the order in the above proceeding, entered in the office of the clerk of the county of Ulster on the 30th day of September, 1918, upon a decision of the Appellate Division of the Supreme Court, Third Judicial Department, made at the September Term, 1918, reversing and setting aside an order, dated February 2, 1918, made at a Special Term of

the Supreme Court, and entered in the office of the clerk of th county of Ulster on the 8th day of March, 1918, which order Special Term directed that an alternative writ of prohibition issu out of and under the seal of the Supreme Court directed to the Publ Service Commission, Second District, and others, in the above-e titled proceeding, and from each and every part of said order reversal.

You will further take notice, That relator hereby appeals fro judgment entered herein upon the aforesaid order of reversal, an granting costs to the respondents, which said judgment was enter in the office of the clerk of the county of Ulster on the 15th day October, 1918, and that relator intends to bring up for review th order of the Public Service Commission, Second District, State New York, made August 23, 1918, overruling the demurrer of relat to the complaint in the original proceeding, above entitled, pendi before said Commission.

You will further take notice, That this appeal is taken by virt of permission duly granted by the Appellate Division, Third D partment, by an order dated and entered in the office of the clerk said court on November 22, 1918, and also as a matter of right.

Yours, etc.,

FISHER & FISHER,
Attorneys for Relator-Appellant,
Pennsylvania Gas Company.

503 Wellman Bldg., Jamestown, N. Y.

8 To The Clerk of County of Ulster and Ledyard P. Hale, Es
Attorney for Respondent Public Service Commission, S
ond District.
Messrs. Thrasher & Clapp, Attorneys for Respondents Alfr
C. Davis and Others and Special Counsel for City of Jam
town, N. Y. and
Cheston A. Price, Esq., Corporation Counsel for Respond
City of Jamestown, N. Y. and
Robert H. Jackson, Esq., Acting Corporation Counsel
Respondent City of Jamestown, Jamestown, N. Y.

Original filed Nov. 23, 1918.
C. K. LOUGHRAN,
County Clerk of Ulster Co.

Order to Show Cause.

At a Term of the Appellate Division, Third Department, of the S preme Court of the State of New York, Held at the Appellate D vision Court-house, in the Albany County Court-House, at the C of Albany, N. Y., on the 20th Day of November, 1918.

Present: Hon. John M. Kellogg, P. J.; Hon. George F. Ly Hon. John Woodward, Hon. Aaron V. S. Cochrane, Hon. Henry Kellogg.

In the Matter of the Application of PENNSYLVANIA GAS COMPANY, Respondent, for a Writ of Prohibition, Directed to Public Service Commission, Second District, and Alfred C. Davis and Others and the City of Jamestown, N. Y., Appellants.

On reading and filing the affidavit of Jerome B. Fisher, verified the 20th day of November, 1918, and upon all the papers heretofore filed in this court herein, let the defendants above named or their attorneys show cause before this court at a term thereof to be held at the Appellate Division, Third Department, in the Albany county court house in the city of Albany, N. Y., on the 22d day of November, at 10 o'clock in the forenoon or as soon thereafter as counsel can be heard, why an order should not be made for a stay therein pending an appeal to the Court of Appeals, and also for leave to appeal to said Court of Appeals upon questions of law mentioned and set forth in the said affidavit of Jerome B. Fisher, with the usual directions, and that the plaintiff have such further or other relief as to this court may seem just and proper.

Personal service of this order upon the Public Service Commission, Second District, or its attorney, or its counsel, Ledyard P. Hale, Esq., on or before the 21st day of November, 1918, at 12 o'clock noon, and service by mail upon the attorneys for Alfred C. Davis and others, and the city of Jamestown, N. Y., by mailing a copy thereof in the postoffice at the city of Albany, N. Y., duly sealed, postpaid and addressed thereto on or before 6 o'clock p. m. on the 20th day of November, 1918, shall be sufficient, and in the meantime and until the hearing and determination of this motion and the entry of the order thereon let all proceedings on the part of defendants be stayed. JOHN M. KELLOGG, *P. J.*

To Hon. Ledyard P. Hale, Counsel for Public Service Commission, Second District, 58 North Pearl street, Albany, N. Y.
Thrasher & Clapp, Esqs., Attorneys for Alfred C. Davis and Others, 504 Fenton Building, Jamestown, N. Y.
Hon. Cheston A. Price, Corporation Counsel, City of Jamestown, Jamestown, N. Y.

Affidavit on Order to Show Cause.

Supreme Court, Appellate Division, Third Department.

In the Matter of the Application of PENNSYLVANIA GAS COMPANY, Respondent, for a Writ of Prohibition, Directed to Public Service Commission, Second District, and Alfred C. Davis and Others and the City of Jamestown, Appellants.

STATE OF NEW YORK,
City and County of Albany, ss:

Jerome B. Fisher, being duly sworn, deposes and says that he is a member of the firm of Fisher & Fisher, attorneys for the

11 respondent, Pennsylvania Gas Company. That his associate, Marion H. Fisher, has had charge of the above case, prepared the brief and argued the same in this court. That the appeal herein was decided by this court on the 17th day of September, 1918, reversing the order of the Ulster Special Term, Hasbrouck, J., directing the issuance of an alternative writ of prohibition against the appellants commanding them to desist and refrain from taking further proceedings or action in a proceeding pending before the Public Service Commission and authorizing the Public Service Commission to proceed in the matter. The order of this court has been duly served upon Fisher & Fisher, attorneys for the Pennsylvania Gas Company.

That the present term of this court convened on November 12, 1918, and deponent is informed that it will adjourn on Friday, November 22d, and that this is the term of court under the law at which the respondent, Pennsylvania Gas Company, must make application for a stay and for leave to appeal to the Court of Appeals.

That it has been the intention of the attorneys for the respondent gas company to make application at this term for a stay and leave to appeal to the Court of Appeals and that Marion H. Fisher, a member of said firm, who has had charge of said case for the gas company, has been busy at a Trial Term of the Supreme Court, Chautauqua county, and in the performance of his duties before the grand jury at said term as assistant district attorney, and that for that reason he has been unable to prepare the papers and make application for such leave to appeal to the Court of Appeals and for a stay. That he understood that this term of court would continue through next week. That the term of court at which the order of reversal

12 herein was granted convened at Saratoga Springs on September 10, 1918. That the opinion herein was handed down on September 17th, and the order was filed in the office of this court on September 25th and was thereafter filed in the office of the clerk of Ulster county on September 30th, and served on deponent's assistant on October 10th. Thereafter a judgment was entered in the Ulster county clerk's office on October 15, 1918, and served upon said Marion H. Fisher on October 16th. The judgment confirmed the order with costs. The deponent learned yesterday that the court was to adjourn on Friday.

The papers now on file in this court show that all the gas sold by the respondent, Pennsylvania Gas Company, in the State of New York, is produced at the wells in Pennsylvania and transported into the State of New York, and it is claimed by the said gas company that such delivery of gas is interstate commerce and that any interference therewith or regulation thereof by the Public Service Commission of the State of New York is and would be an unconstitutional restriction upon interstate commerce and that the Public Service Commission of this State has no power or jurisdiction to regulate the rates to consumers within the State of New York of natural gas furnished by the respondent, Pennsylvania Gas Company. The said Pennsylvania Gas Company claims and insists that such production in

Pennsylvania of natural gas and the transportation and sale thereof in the State of New York is national in its character and not local and that the natural gas is a national product and not a local product.

The deponent further says that it is the opinion of the attorneys for the Pennsylvania Gas Company that said company may appeal to the Court of Appeals as matter of right under subdivision 1 of section 190 of the Code of Civil Procedure as the order granted by this court is the final determination of a special proceeding and is an order of reversal.

The attorneys for the appellants, Alfred C. Davis and others, insist that there is no such right of appeal and to protect its rights and avoid any question the respondent, Pennsylvania Gas Company, desires the permission of this court to appeal to the Court of Appeals under subdivision 4 of section 190 of the Code of Civil Procedure.

Respondent therefore respectfully requests permission of this court to appeal to the Court of Appeals from the reversal of the decision of the Special Term upon the ground that this case presents questions of law, which, in the opinion of this court, ought to be reviewed by the Court of Appeals, and also upon the ground that said appeal is required in the interest of substantial justice and for a stay pending the hearing of said appeal, and for such further order as may be just in the premises.

Because of the adjournment of court aforesaid respondent also requests that an order to show cause returnable at this court on Friday morning, November 22, 1918, be granted. No other application for such order has been made herein.

JEROME B. FISHER.

Sworn to before me this 20th day of November, 1918.

FLORENCE E. BUSWELL,
Notary Public, Albany County, N. Y.

Order for Leave to Appeal to Court of Appeals and Stay.

At a Term of the Appellate Division, Third Department, of the Supreme Court of the State of New York, Held in the Albany County Court-house, at the City of Albany, N. Y., on the 22d Day of November, 1918.

Present: Hon. John M. Kellogg, P. J.; Hon. George F. Lyon, Hon. John Woodward, Hon. Aaron V. S. Cochrane, Hon. Henry T. Kellogg, Justices.

In the Matter of the Application of PENNSYLVANIA GAS COMPANY, Respondent, for a Writ of Prohibition, Directed to Public Service Commission, Second District, and Alfred C. Davis and Others and the City of Jamestown, Appellants.

Upon the order to show cause heretofore granted herein on November 20, 1918, and returnable at this court on November 22, 1918, and after hearing Marion H. Fisher, Esq., of counsel for the Penn-

sylvania Gas Company, Hon. Ledyard P. Hale, for the Public Service Commission, Second District, of the State of New York, and Louis L. Thrasher, Esq., for Alfred C. Davis and others, and as special counsel for the city of Jamestown, N. Y., and due deliberation having been had thereon, now,

15 On motion of Marion H. Fisher, Esq., of counsel for the Pennsylvania Gas Company, it is

Ordered, That in the opinion of this court questions of law are involved which ought to be reviewed by the Court of Appeals, and also that such an appeal is required in the interest of substantial justice. It is further

Ordered, That the following question is hereby certified and submitted to the Court of Appeals:

"Upon the facts stated in the record herein, has the Public Service Commission, Second District, of the State of New York, power or jurisdiction over the rates of the Pennsylvania Gas Company for natural gas produced by said company in the State of Pennsylvania and transported in pipes and distributed and sold by it directly to consumers in the city of Jamestown, Chautauqua county, State of New York?"

It is further ordered, That pending an appeal to the Court of Appeals all proceedings under and pursuant to the order of reversal heretofore granted by this court herein, and the judgment entered thereon, and before and by the Public Service Commission, Second District, of the State of New York, and by the complainants before said Commission pursuant to the order of reversal heretofore granted by this court and entered in the office of the clerk of the county of Ulster on or about the 30th day of September, 1918, be and the same hereby are stayed until the opening of the next January term of this court, at which time application for a further stay will be heard. This stay is granted without security.

JOSEPH H. HOLLANDS, *Clerk.*

Original filed Nov. 23, 1918.
C. K. LOUGHRAN,
County Clerk of Ulster Co.

16 *Order Reversing Writ of Prohibition.*

At a Term of the Appellate Division of the Supreme Court, Third Department, Held at the City of Saratoga Springs, Commencing 10th of September, 1918.

Present: Hon. John M. Kellogg, Presiding Justice; Hon. George F. Lyon, Hon. John Woodward, Hon. Aaron V. S. Cochrane, Hon. Henry T. Kellogg, Associate Justices.

the Matter of the Application of PENNSYLVANIA GAS COMPANY, Respondent, for a Writ of Prohibition, Directed to Public Service Commission, Second District, Alfred C. Davis and Others and City of Jamestown, Appellants.

The appeal herein having been argued by Mr. Ledyard P. Hale, ounsel to Public Service Commission, Second District, and Mr. ouis L. Thrasher for the appellants, and by Mr. Marion H. Fisher r the respondent; and due deliberation having been had thereon, is now on motion of Ledyard P. Hale, Counsel to Public Service ommission, Second District, Messrs. Thrasher & Clapp, attorneys r Alfred C. Davis and others, and Cheston A. Price, Corporation ounsel for City of Jamestown,

Ordered: 1. That the order appealed from (to wit, the order dated February 2, 1918, and entered in the Clerk's office of Ulster county, March 8, 1918, which directed that alternative writ of prohibition issue out of and under the seal of is court directed to Public Service Commission, Second District d others) is wholly reversed and set aside.

2. That appellant, Public Service Commission, Second District, is thorized to proceed in the matter before it as if the alternative it of prohibition had not been issued.

3. That appellants recover fifty dollars costs and their disburseents and have execution therefor.

JOSEPH H. HOLLANDS, *Clerk*.

A copy.

[SEAL.] JOSEPH H. HOLLANDS, *Clerk*.

Judgment on Order Reversing Writ.

Supreme Court, Ulster County.

the Matter of the Application of PENNSYLVANIA GAS COMPANY for a writ of prohibition, directed to the Public Service Commission, Second District, and to Alfred C. Davis, the City of Jamestown, and others, complainants in a proceeding pending before said Commission entitled: In the Matter of the Complaint of Alfred C. Davis and Others, of Jamestown, N. Y., under Section 71 of Public Service Commissions Law, against Pennsylvania Gas Company, as to price of Natural Gas charged to private consumers, Case No. 6040.

The Pennsylvania Gas Company having applied to one of the stices of the Supreme Court for a writ of prohibition directed to e Public Service Commission, Second District of the State of New rk, and to Alfred C. Davis, the city of Jamestown, and others, mplainants in a proceeding pending before said Commission enled: "In the Matter of the Complaint of Alfred C. Davis and hers of Jamestown, New York, under Section 71 of Public Serce Commissions Law against Pennsylvania Gas Company as to

Price of Natural Gas charged to private consumers, Case No. 6040,
and the said Justice at a special term held before him in the city o
Kingston, New York, on the 2nd day of February, 1918, grante
and directed the entry of an alternative writ of prohibitio
19 commanding the said respondents and each of them, thei
agents and attorneys to desist and refrain from taking an
further action in the proceeding pending before said Commissio
until the further direction of the court and further requiring ther
to show cause at a term of the court to be held at the Court House i
the City of Kingston, on April 6, 1918, why the said respondent
should not be absolutely restrained from any further proceedings
and a writ of prohibition having heretofore issued out of this cou
on the 8th day of March, 1918; and on the return date of said orde
to show cause; and the petitioners in the said original proceedin
having taken an appeal from the order allowing said writ to the Ap
pellate Division of the Supreme Court for the Third Department o
the State of New York, and upon the argument of said appeal th
said Appellate Court having made and entered its order at a ter
commencing on the 10th day of September, 1918 after hearing th
counsel for the respective parties, reversed and wholly set aside th
order so made and entered on February 2, 1918 and filed in th
Clerk's office of Ulster County, March 8, 1918, directing the issue o
an alternative writ of prohibition and having authorized the Publi
Service Commission, Second District to proceed in its proceeding a
if such writ had not been issued, together with $50.00 costs, beside
disbursements to such appellants. Now, therefore, on motion o
Hon. Ledyard P. Hale, Counsel to Public Service Commission, Se
ond District, Cheston A. Price, Corporation Counsel for the City o
Jamestown and Thrasher & Clapp, Attorneys for the petitioner
Alfred C. Davis and others, it is hereby

Ordered and adjudged, that the Appellant, Public — cou
20 heretofore made and entered in the above entitled proceed
ing on the 2nd day of February, 1918, and entered in th
office of the clerk of the County of Ulster on the 8th day of March
1918, directing the issue of an alternative writ of prohibition out o
and under the seal of this court directed to the Public Service Com
mission, Second District, the City of Jamestown and Alfred C. Davi
and others, be and the same hereby is wholly reversed and set aside
and it is

Ordered and adjudged, that the Appellant, Public Service Com
mission, Second District, be and it hereby is authorized, empowered
and directed to proceed in the proceeding heretofore instituted be
fore it by the Appellants, Alfred C. Davis and others in the sam
manner as if such alternative writ of prohibition had not been issued
and it is further

Ordered and adjudged, that the Public Service Commission, Sec
ond District, City of Jamestown and Alfred C. Davis, Samuel A
Carlson, Cheston A. Price, Merlin A. Bliss, Alexander K. Nair, C. A
Call, William H. Anderson, Smith Ackroyd, E. W. Henning, Joseph
M. Theolander, George W. Jude, C. W. Herrick, O. N. Rushworth
John B. Sherman, Fred R. Hemphill, F. W. Gurney, L. A. McCu

ugh, Charles E. Lindstrom, John A. Anderson, F. A. Nelson, C. A. Fleming, W. W. Trumbull, John M. Thomas, L. M. Drake, L. F. Leonhart, P. W. Engstrom, A. J. Lendberg, C. M. Johnson, Frank Conley, J. W. Durham, Carl W. Hermanson, Edward O. Peterson, A. Stone, C. F. Bates, G. E. Stanley, A. C. Swezey, J. M. Sweet, H. Perry, Fred Pfeil, F. F. Lockwood, Algot J. E. Larson, Charles Anderson, C. L. Smith, Charles O. Jarl, R. G. Bullock, E. J. Card, H. Stone, O. W. Swanson, E. G. Sampson, J. G. Young, R. Nyberg, G. A. Anderson, O. C. Lee, F. A. Brightman, C. A. Johnson, J. F. Bauer, H. O. Lindholm, Carl W. Leberg, J. R. Jones, H. A. Morgan, C. K. Hauenstein, C. G. Seagren, E. C. sh, L. Skar, H. E. Leave, E. R. Strong, H. Martens, C. O. Peterson, Hegstedt, Alfred Swanson, E. E. Johnson, E. V. Fosberg, A. Burns, Feldhous, Axel Anderson, P. E. Peterson, Evar C. Anderberg, W. Bauer, Axel Winsell, Gust A. Lofgren, Bert J. Swanson, harles Ohnstrand, B. G. Johnson, R. Peterson, J. W. Chadwick, Dan agan, Albin Ljungren, Leon C. Leroy, C. A. Carlson, Ernest C. olst, Carl Olofson, Albert W. Edeborg, P. A. E. Carlson, Albert B. alther, Edward Mulvehill, Gust Flink, C. P. Carlson, John E. hlin, A. Hanson, Nels Forsgren, William Sandberg, John N. Engll, C. G. Lawson, G. Anderson, Gust Anderson, A. F. Berg, G. A. se, John Christofferson, J. W. Scofield, Harry Lindholm, Clark efeld, Alfred Lund, Ernest A. Stromdahl, C. F. Johnson, C. A. hnson, Joseph E. Wennerstrom, John Lindberg, Otto Nelson, Fritz erson, Gust A. Johnson, Herman Carlson, C. J. F. Engman, E. W. derson, A. N. Camp, C. J. Higgs, Gust Lindstrom, C. A. Peterson, dian Sellstrom, and John A. Westman recover of and from the nsylvania Gas Company the sum of one hundred and ninety-six lars and eighty-four cents their costs and disbursements as taxed the Clerk and have execution therefor.

Judgment signed this 15th day of October, 1918.

P. K. LOUGHRAN, *Clerk.*

Original filed Oct. 15, 1918.

C. K. LOUGHRAN,

County Clerk of Ulster Co.

22 *Opinion of Appellate Division on Reversal.*

Third Department, September 17, 1918.

In the Matter of the Application of PENNSYLVANIA GAS COMPANY Respondent, for a Writ of Prohibition, Directed to Public Servic Commission, Second District, and Alfred C. Davis and Others an the City of Jamestown, Appellants.

Appeal by the defendants, Alfred C. Davis and others and the Cit of Jamestown from an order of the Supreme Court, made at th Ulster Special Term and entered in the office of the clerk of th County of Ulster on the 8th day of March, 1918, directing the iss ance of an alternative writ of prohibition against the appellant commanding them to desist and refrain from taking further pr ceedings or action in a proceeding pending before the Public Ser ice Commission.

Ledyard P. Hale, for the appellant Public Service Commission.

Thrasher & Clapp, for the appellants Alfred C. Davis and other

Cheston A. Price [Louis L. Thrasher, special counsel], for the a pellant City of Jamestown.

Fisher & Fisher [Marion H. Fisher and J. E. Mullin of counsel for the respondent.

LYON, *J.*:

The question presented by this appeal is whether the Public Ser ice Commission of the State has the power to regulate the rates consumers, within the State, of natural gas furnished by the r spondent, the Pennsylvania Gas Company.

23 The facts are undisputed. The Pennsylvania Gas Co pany is a foreign corporation engaged in transporting a selling natural gas in the States of New York and Pennsylvani Its source of supply is solely in the State of Pennsylvani It transports by pipe lines, about fifty miles in length, into the Sta of New York. It sells and delivers gas to consumers in the city Jamestown, in the town of Ellicott, and in the village of Falcone all within the county of Chautauqua. It also sells and delivers na ural gas to consumers in the cities of Warren, Corry and Erie in t State of Pennsylvania.

Pursuant to subdivision 3 of section 8 of article 1 of the Co stitution of the United States, the Congress is given power "to re ulate commerce with foreign nations, and among the several State and with the Indian tribes," and by section 18 "to make all la which shall be necessary and proper to carry into execution the for going powers * * *." The Interstate Commerce Act provid that the act shall not apply to the transportation through pipe lin of natural or artificial gas. (§ 8563.) It is conceded that Congre has not acted, other than on August 10, 1917, when it delegated

President the power to control the disposition of natural gas. is conceded that he has not acted. It is also conceded that the blic Service Commission has jurisdiction of the subject-matter and the person of the respondent unless its jurisdiction is an uncon- itional restriction upon interstate commerce. (Pub. Serv. Com. , § 66.) It is also conceded that the flow of gas from one State nother State, through a pipe line, is interstate commerce.

In Port Richmond Ferry v. Hudson County (234 U. S. 317) the ferry company sought to review the action of the board of chosen freeholders of Hudson county in fixing the s to be taken at its ferry within that county for the transporta- of foot passengers for single trips to the New York terminal. e action was taken under the authority of an act of the Legis- re of New Jersey. The ferry was Port Richmond, S. I., N. Y., Bergen Point, N. J., and was not operated in connection with any road. The courts of New Jersey sustained the validity of the s against the objection that they were repugnant to the com- ce clause of the Federal Constitution. The United States Su- me Court affirmed the judgment, holding that the ferry company engaged in interstate commerce; that it presents a situation es- ially local requiring regulation according to local conditions; that if Congress at any time undertakes to regulate such rates, its n will control.

n Haskell v. Cowham (187 Fed. Rep. 403) the circuit judge, th circuit, said: "Interstate commerce in natural gas, including en its transportation among the States by pipe line, is a subject onal in its character and susceptible of regulation by uniform . The silence or inaction of Congress relative to such a subject conclusive indication that it intends that interstate commerce ein shall be free, and any law or act of a state or of its officers ch prohibit it or substantially restrains its freedom is violative of Constitution and void. (Welton v. State of Missouri, 91 U. S. 282.)" It will be noted that the case cited relates to discrim- on in favor of goods, wares and merchandise which are the prod- of the State.

n Landon v. Public Utilities Commission (242 Fed. Rep. 658) district judge, eighth circuit, held that the rates fixed were non- compensatory, unreasonably low and confiscatory, and in vio- lation of the Constitution of the United States, and that the enforcement by the State in which sales are made of any law regulation fixing the price to consumers which are substantially lens upon the business or render it impossible to conduct it at a profit, is an undue interference with interstate commerce and in ation of the commerce clause of the Federal Constitution. It held that action by the State in fixing rates is not warranted, reaches the conclusion, therefore, that the interstate commerce which the receiver is engaged is not of a local nature and is not, in the absence of action by Congress, subject to burdens or reg- ions imposed by State action.

n Manufacturers Light & Heat Co. v. Ott (215 Fed. Rep. 940,

944), an action brought to enjoin the Public Service Commission
West Virginia, the court said: "We are unable to agree that the f
ing of the rates to be charged by complainants to their customers
West Virginia is an unlawful regulation of interstate commer
The regulation of companies engaged in the transportation of g
is expressly excluded from the scope of the interstate commer
statute. * * * Nothing is attempted except the regulation
the prices of natural gas to the citizens of West Virginia to
charged by corporations operating in West Virginia under St
authority. The action of these corporations in uniting their oper
tions with those of like corporations of Ohio and Pennsylvania
pumping gas into a common system of pipes supplying customers
the three states, may produce the result that some gas from Ohio a
Pennsylvania comes into West Virginia, although it is undisput
that a much larger quantity of gas goes out of West Virginia in
Ohio and Pennsylvania than can possibly come in from these States
The court held that the complainant had failed to establi
26 that the rates were unreasonably low and confiscatory
violated any right guaranteed by the constitution or statu
of the United States, and denied the application for a tempora
injunction.

In Missouri Pacific Railway v. Larabee Mills (211 U. S. 612, 62
it was held that notwithstanding the creation of the Interstate Co
merce Commission and the delegation to it by Congress of the co
trol of certain matters, a State may, in the absence of express acti
of Congress, or by such Commission, regulate for the benefit of
citizens local matters indirectly affecting local commerce.

In Minnesota Rates Case (230 U. S. 352) the court says: "E
within these limitations there necessarily remains to the Stat
until Congress acts, a wide range for the permissible exercise of pow
appropriate to their territorial jurisdiction, although interstate co
merce may be affected. It extends to those matters of a lo
nature as to which it is impossible to derive from the constitutio
grant an intention that they should go uncontrolled pending Fede
intervention. * * * Where the subject is peculiarly one
local concern, and from its nature belongs to the class with wh
the State appropriately deals in making reasonable provision
local needs, it cannot be regarded as left to the unrestrained will
individuals because Congress has not acted, although it may h
such a relation to interstate commerce as to be within the reach
the Federal power."

The case seems to turn upon the question whether natural
is a national product or a local product.

In the case of Jamieson v. Indiana Natural Gas & Oil Co. (1
Ind. 555) the court says: "Upon this point we affirm that natu
gas is characteristically and peculiarly a local product, t
27 its production is confined to a limited territory, that beca
of its local characteristics and peculiarities, it is a pro
subject for State legislation, and cannot, so far as regards lo
protection, be made the subject of general legislation by Congre

at all events, that it does 'not require a uniform system as between States' for its regulation."

In the case of Ohio Oil Company v. Indiana, No. 1 (177 U. S. 206) Mr. Justice White refers approvingly to the above statement.

While it is a matter involved in some doubt, we are inclined to believe that natural gas is a local product, and that the Public Service Commission has jurisdiction.

The order for the writ of prohibition should be reversed, and an order granted authorizing the Public Service Commission to proceed with the matter before it as if the alternative writ had not been issued, with fifty dollars costs and disbursements.

All concurred, except Woodward, J., not voting.

Order reversed, writ dismissed and matter remitted to the Public Service Commission for its consideration, with fifty dollars costs and disbursements.

Notice of Appeal to Appellate Division by Alfred C. Davis, City of Jamestown, and Others.

In the Matter of the Application of PENNSYLVANIA GAS COMPANY for a writ of prohibition, directed to the Public Service Commission, Second District of the State of New York, and to Alfred C. Davis, the City of Jamestown, and Others, Complainants in a proceeding pending before the Commission entitled: In the Matter of the Complaint of Alfred C. Davis and Others, of Jamestown, N. Y., under Section 71 of Public Service Commissions Law, against Pennsylvania Gas Company, as to price of Natural Gas charged to private consumers, Case No. 6040.

Sirs: Please take notice, that said Alfred C. Davis, the City of Jamestown, and others, Complainants, in a proceeding pending before said Commission entitled: In the Matter of the Complaint of Alfred C. Davis and others, of Jamestown, N. Y., under Section 71 of Public Service Commissions Law against Pennsylvania Gas Company, as to price of natural gas charged to private consumers, Case No. 6040, hereby appeal to the Appellate Division of the Supreme Court, in and for the Third Judicial Department, from an order dated February 2, 1918, which order was filed in the Clerk's office of the County of Ulster, State of New York, on March 8, 1918, and which directed that an alternative writ of prohibition issue out of the Supreme Court, directed to the Public Service Commission, Second District, of the State of New York, and Alfred C. Davis, City of Jamestown, and others, commanding them and each of them to desist and refrain from taking further proceedings or action in a proceeding pending before said Commission and entitled: "In the Matter of the Complaint of Alfred C. Davis and others, of Jamestown, N. Y., under Section 71 of the Public Service Commissions Law, against the Pennsylvania Gas Company, as to price

of natural gas charged to private consumers, Case No. 6,040," and from each and every part of said order.

Dated, March 15, 1918.

Yours, etc.,

THRASHER & CLAPP,
Attorneys for Alfred C. Davis and Others, Jamestown, N. Y.
CHESTON A. PRICE,
Corporation Counsel, City of Jamestown, Jamestown, N. Y.
LOUIS L. THRASHER,
Special Counsel, City of Jamestown, Jamestown, N. Y.

To Fisher & Fisher, Attorneys for Petitioner, Pennsylvania Ga Company, and
Christopher K. Loughran, County Clerk, Ulster County.

Original filed Mar. 18, 1918.
C. K. LOUGHRAN,
County Clerk of Ulster Co.

30 *Notice of Appeal to Appellate Division, Public Service Com mission.*

Supreme Court, Ulster County.

In the Matter of the Application of PENNSYLVANIA GAS COMPAN for a writ of prohibition, directed to the Public Service Commis sion, Second District, and to Alfred C. Davis, the City of James town, and others, complainants in a proceeding pending befor said Commission entitled: In the Matter of the Complaint of A fred C. Davis and Others, of Jamestown, N. Y., under Section 7 of Public Service Commissions Law, against Pennsylvania Ga Company, as to price of Natural Gas charged to Private consumer Case No. 6040.

To Fisher & Fisher, Attorneys for Petitioner, 501-504 Wellma Bldg., Jamestown, N. Y., and the County Clerk of Ulster County

GENTLEMEN: The Public Service Commission, Second Distric hereby appeals to the Appellate Division, Third Department, fro the order herein of the Special Term of the Supreme Court held a Kingston, February 2, 1918, entered in the clerk's office of Ulste County, March 8, 1918, which directed that an alternative writ o prohibition issue out of and under seal of this court directe
31 to Public Service Commission, Second District, and other and from each and every part of such order.

Dated, March 20, 1918.

Yours etc., LEDYARD P. HALE,
Counsel to Public Service Commission, Second District.

Original filed Mar. 21, 1918.
C. K. LOUGHRAN,
County Clerk of Ulster Co.

Notice of Motion for Writ of Prohibition.

Supreme Court, State of New York.

In the Matter of the Application of PENNSYLVANIA GAS COMPANY for a writ of prohibition, directed to the Public Service Commission, Second District, of the State of New York, and to Alfred C. Davis, the City of Jamestown, and Others, Complainants in a proceeding pending before said Commission entitled: In the Matter of the Complaint of Alfred C. Davis and Others, of Jamestown, N. Y., under Section 71 of Public Service Commissions Law, against Pennsylvania Gas Company, as to price of Natural Gas charged to private consumers, Case No. 6040.

SIRS: Please take notice, That upon the annexed petition of the Pennsylvania Gas Company verified the 21st day of January, 1918, and upon the papers therein referred to, copies of which are herewith served upon you, the undersigned will move this Court at a Special Term thereof to be held at the Court House in the City of Kingston in the County of Ulster on the second day of February, 1918, at eleven o'clock in the forenoon or as soon thereafter as counsel can be heard, for an order granting an alternative writ of prohibition directed to the Public Service Commission, Second District, State of New York, and to Alfred C. Davis, the City of Jamestown and others, Complainants, in a proceeding pending before said Commission entitled, "In the Matter of the complaint of Alfred C. Davis and others, of Jamestown, New York, under Section 71 of the Public Service Commissions Law against Pennsylvania Gas Company as to price of natural gas charged to private consumers, Case No. 6,040," and for such other or further relief as to the Court may seem just and proper, together with the costs of this motion.

FISHER & FISHER,
Attorneys for Pennsylvania Gas Company.

Office and Postoffice Address, 503 Wellman Building, Jamestown, New York.

To Public Service Commission, Second District, State of New York.
Thrasher & Clapp, Esqs., Attorneys for Alfred C. Davis and others, Jamestown, New York.
Cheston A. Price, Esq., Corporation Counsel of the City of Jamestown, N. Y.

33 *Petition for Writ of Prohibition.*

Supreme Court, State of New York.

In the Matter of the Application of PENNSYLVANIA GAS COMPAN for a writ of prohibition, directed to the Public Service Commission, Second District, of the State of New York, and to Alfred C Davis, the City of Jamestown, and Others, Complainants in a proceeding pending before said Commission entitled: In the Matte of the Complaint of Alfred C. Davis and Others, of Jamestown N. Y., under Section 71 of Public Service Commissions Law against Pennsylvania Gas Company, as to price of Natural Ga charged to private consumers, Case No. 6040.

To the Supreme Court of the State of New York:

The petition of the Pennsylvania Gas Company respectfully shows to the Court the following facts constituting its grievance herein:

1. That petitioner is a corporation duly organized and doing business under the laws of the State of Pennsylvania, with its principal office at 213 Second Avenue, Warren, Pennsylvania; that petitioner has duly filed the required certificate to authorize it to do business in the State of New York and maintains an office at 312 Cherry Street, Jamestown, New York.

34 2. That at all the times herein mentioned the Public Service Commission, Second District, State of New York, by virtue of the statutes of the State of New York, was vested with certain limited jurisdiction and power over public service corporations within said State, the powers so conferred including both ministerial and judicial functions.

3. That the only business conducted by petitioner within the State of New York is the transportation and sale of natural gas to consumers in the City of Jamestown and the adjoining Village of Falconer and Town of Ellicott within said State; that petitioner produces no gas within the State of New York, nor does it purchase or use any gas produced in said State; that all the gas sold by petitioner to consumers within the State of New York is produced or purchased by petitioners within the State of Pennsylvania and transported by petitioner across the State line to the aforesaid consumers; that the petitioner delivers its gas direct to its consumers in the State of New York; that in the distribution and sale of such gas in the aforesaid communities the petitioner operates under certain local franchises which franchises contain no price or rate limitation; that the principal gas fields aforesaid, from which the petitioner secures its gas are located approximately fifty miles from said City of Jamestown. The petitioner further states that less than 5% of the gross value of petitioner's entire property is located within the State of New York; that all petitioner's gas lands and gas fields and leases and a large percentage of its transportation mains, pumping stations and other property constituting 95% in value of petitioner's total property i

located in the State of Pennsylvania beyond the territorial jurisdiction of the Public Service Commission, Second District. That the petitioner's property in the State of New York consist almost entirely of local mains, distributing lines, service pipes and meters.

4. That after due notice petitioner, effective May, 15, 1917, increased the rate for gas sold by it within the City of Jamestown and adjoining Town of Ellicott and Village of Falconer from thirty cents per thousand net to thirty-five cents a thousand net; that thereafter Alfred C. Davis and certain other consumers, residents of the City of Jamestown, New York, filed a written complaint, dated May 18, 1917, with the Public Service Commission, Second District, of the State of New York, complaining against the aforesaid increase in rate and demanding an investigation and reduction by said Commission in the charge made by petitioner for gas in said city; that Messrs. Thrasher & Clapp, attorneys of the City of Jamestown, New York, appeared as attorneys for all of said complainants and are still their attorneys.

5. That said Public Service Commission, Second District, received and filed said complaint and assumed jurisdiction over the subject matter thereof and by order, dated June 4, 1917, which order was duly served upon petitioner, together with a copy of the complaint, directed and required your petitioner

"that the matters complained of be satisfied by said Company, or that the charge in said complaint be answered in writing within twenty days."

6. Petitioner alleges on information and belief that the said Commission has no jurisdiction over the subject matter, has no power or authority to fix the rates at which petitioner shall sell its gas within the State of New York, and no power or authority to require petitioner to attend a hearing thereon, and that said proceedings have been taken by the Commission without authority of law and without jurisdiction, and are and will be oppressive to your petitioner.

7. That your petitioner raised by demurrer before the said Commission and attempted to raise by certiorari in the Supreme Court the objection that said Commission is without jurisdiction or authority in the matter; that such objection has been overruled by said Commission and that your petitioner has no other remedy or relief at law or in equity or otherwise than by the writ of prohibition herein prayed for.

8. That the complaint aforesaid, dated May 18, 1917, filed by Alfred C. Davis and others, with the Commission, contains, among others, the following allegations of fact which petitioner refers to as showing that on the face of the complaint the respondent Commission has no jurisdiction of the subject matter, to wit:

That defendant is a Pennsylvania corporation and is "engaged principally in the business of transporting and marketing natural gas. That the source of supply of such natural gas to such Pennsylvania Gas Company is wholly within the State of Pennsylvania.

That defendant markets its natural gas in part within the State of New York and, among other places, in the City of Jamestown, "within which city the sole source of supply of natural gas to consumers is furnished by said Pennsylvania Gas Co." * * * "That the source of supply of said Pennsylvania Gas Company is at or near the City of Warren, in the State of Pennsylvania, and
37 that said City of Warren is distant from said City of Jamestown approximately twenty-two miles." * * * That defendant supplies, "besides the said City of Jamestown, consumers within the Village of Falconer and Town of Ellicott, both in said Chautauqua County, New York, and the Cities of Warren, Corry and Erie in the State of Pennsylvania."

Petitioner alleges that the facts above quoted from the consumers' complaint are true, except the statement as to the location of petitioner's gas fields which, as above stated, are approximately fifty miles from Jamestown.

9. That, on June 23, 1917, petitioner duly served upon the Commission and complainants a demurrer to said complaint which demurrer specifically put at issue the jurisdiction of the Commission over the subject matter of the complaint.

10. That, on July 31, 1917, on stipulation, the City of Jamestown was, by order of the Commission, made a party to the proceedings as a complainant under the original complaint; that Messrs. Thrasher & Clapp were employed by said city as attorneys and counsel in the proceeding to act with Cheston A. Price, Esq., the city attorney of said city, and are still acting as such attorneys in the proceeding.

11. That, on August 23, 1917, the Commission, after a hearing made and served upon petitioner a formal order overruling its demurrer and requiring petitioner to answer the complaint. That petitioner thereafter and on the 20th day of September, 1917, in order to exhaust its remedy before said Commission, filed with the Commission a verified petition praying for a re-hearing before the full Commission upon the issue of jurisdiction raised by demurrer
38 that said application for a rehearing was denied by the Commission by order dated Sept. 27, 1917. That thereupon petitioner, treating said order as a final determination upon the question of jurisdiction within Section 2122 of the Code of Civil Procedure applied upon verified petition at Special Term, Albany County, and secured a writ of certiorari, together with a stay, commanding the Commission to certify and return its proceedings in the matter. That the complainants, Alfred C. Davis and others, were, by order made upon stipulation, permitted to intervene in said certiorari proceeding. That upon the 27th day of November, 1917, said certiorari proceeding was duly brought to a hearing before the Appellate Division, Third Department, at which hearing the intervening consumers urged that the orders of the Commission overruling the demurrer did not constitute a final determination, subject to a review by certiorari and asked that the proceeding be dismissed. That thereafter, on the 28th day of December, 1917, the Appellate Division handed down its decision, dismissing the writ of certiorari. That accompanying said decision was handed down an unanimous opinion, by which the Court

ld in substance that the orders in question did not constitute a final termination and that a review by certiorari was, therefore, not permissible under the limitations of the Code. That the Court did not in said opinion discuss or determine the question as to whether or not the Commission had jurisdiction of the subject matter at bar.

12. That subsequent to the aforesaid decision of the Appellate Division and on January 12, 1918, the Commission served upon your petitioner a formal order in the original proceedings duly certified, dated January 10, 1918, which order, after reciting the dismissal of the writ of certiorari by the Appellate Division, "ordered that the Pennsylvania Gas Company answer this complaint within ten days after the service on it of a certified copy of this order."

13. The papers above referred to in the original proceedings before the Commission were printed in the record in the certiorari proceeding and for convenience are filed herewith in that form. Petitioner hereby refers to and makes the following papers a part of this petition (the page numbers refer to the pages in the certiorari record on appeal): Schedule "A", complaint of consumers (p. 23); Schedule "B," order of Commission requiring your petitioner to satisfy the complaint or answer (p. 33); Schedule "C," demurrer filed by petitioner (p. 35); Schedule "G," formal order of Commission overruling demurrer (p. 41); Schedule "I," petition for rehearing before Commission (p. 51); Schedule "J," Commission's order denying rehearing (p. 55). Petitioner also refers to and attaches to this petition as Schedule "K" the decision and opinion of the Appellate Division handed down in the certiorari proceeding on December 28, 1917.

14. Your petitioner further states that it has made a full and fair statement of the facts in the case to Fisher & Fisher, its attorneys herein, and also to its attorneys and counsel in the State of Pennsylvania, and that after such statement and an examination of the law by said attorneys, petitioner was advised *and* by them and verily believes and, therefore, alleges on information and belief that the jurisdiction and powers vested in the Public Service Commission, Second District, are limited and that said Commission has no right or power to fix the rates at which petitioner shall sell its gas to consumers within the State of New York; that the transportation to and sale of such gas by petitioner in the State of New York is interstate commerce. That the Commission has no jurisdiction over the question of rate or sale price thereof and no power to compel or require an investigation or hearing thereon and that jurisdiction over such subject is vested exclusively in the Federal Government under the Federal Constitution.

15. Petitioner further states that its demurrer to the jurisdiction of the Commission was interposed and that this application for a writ of prohibition is made in good faith and without purpose of delay.

16. Petitioner alleges on information and belief that the action of the respondent Commission assuming jurisdiction over the subject matter and the aforesaid orders of said Commission, overruling petitioner's demurrer asserting jurisdiction and requiring petitioner to satisfy the complaint or answer and attend a hearing, have been had

are taken without authority of law; that petitioner has no other remedy at law or in equity and that adequate relief can only be had by a writ of prohibition restraining said Commission from further proceeding in such matter; that unless the writ of prohibition herein prayed for is issued, petitioner will unjustly and inequitably be put to great cost and expense in preparation for and in the trial of a hearing upon the merits of the rate increase in question; that such preparation and hearing will subject petitioner to a large expense in the employment of experts to investigate and appraise the value of petitioner's property, including its gas wells, lands and leaseholds, the extent of the available gas supply and the probable life and rate of exhaustion thereof and to a large expense in the employment of attorneys in the trial of said rate hearing, and that in addi-
41 tion thereto a number of petitioner's officers, accountants and employees will be diverted from their regular work and the conduct of the business of petitioner interfered with, all causing great expense and damage to the petitioner.

17. That the question of jurisdiction at issue is novel in this State, and is not only of great interest to petitioner, but is of general importance and interest throughout the State; that such question of jurisdiction should properly be determined by the courts in the first instance rather than subject petitioner to large expense and damage prior to a consideration thereof by the courts.

18. That no other or previous application has been made for the relief prayed for.

Wherefore, your petitioner prays that an alternative writ of prohibition be issued directed to said Public Service Commission, Second District, State of New York, which issued the orders and assumed jurisdiction in the above matter and also to Alfred C. Davis, the city of Jamestown and others, in whose favor the proceedings to be restrained were taken, commanding said Commission and said parties, their agents and attorneys to desist and refrain from taking any further proceedings or action in said proceeding pending before such Commission or with respect thereto until further direction of the court, and further requiring them and each of them to show cause why they should not be absolutely restrained from any further proceedings in the aforesaid matter and for such other and further relief as to the court may seem just.

PENNSYLVANIA GAS COMPANY,
By FISHER & FISHER,
Attorneys for Petitioner.

42 STATE OF NEW YORK,
County of Chautauqua, City of Jamestown, ss:

Marion H. Fisher, being duly sworn, deposes and says: That he is an attorney-at-law of the State of New York, residing and practicing his profession in the city of Jamestown, and a member of the law firm of Fisher & Fisher, attorneys for the petitioner, Pennsylvania Gas Company, in the county of Chautauqua.

Deponent further says that he has read the foregoing petition and knows the contents thereof and the facts therein stated and alleged are true to the knowledge of deponent, except as to the facts therein stated to be alleged upon information and belief, and as to those matters he believes it to be true.

That the sources of deponent's information and the grounds of his belief as to the matters therein stated to be alleged upon information and belief are conversations with the officers and agents of the petitioner, Pennsylvania Gas Company, in regard to the matters and facts stated in the petition, and examination of the papers and records in the original proceeding pending before the Public Service Commission, and a careful examination and briefing of the decisions of the United States Supreme Court and other courts, in a large number of cases in connection with the question of the exclusive jurisdiction of the federal government over interstate commerce, including the fixing of rates and sale price of commodities transported in interstate commerce.

That the reason why this petition is not verified by an officer of the said Pennsylvania Gas Company is that no officer of said company authorized to execute such paper resides within the county of Chautauqua.

MARION H. FISHER.

Subscribed and sworn to before me this 21st day of January, 1918.

ANNIE DUNDERDALE,
Notary Public.

Original filed April 22, 1918.

C. K. LOUGHRAN,
County Clerk of Ulster Co.

SCHEDULE A.

(*Petition. Dated May* 18, *Filed May* 31, 1917.)

State of New York, Public Service Commission, Second District.

In the Matter of the Petition of ALFRED C. DAVIS and Others for a Reduction in the Gas Charges to the Consumers within the City of Jamestown, N. Y., for Natural Gas by Pennsylvania Gas Company.

To the Public Service Commission, Second District, State of New York:

The petition of Alfred C. Davis, and those others whose names are hereunto subscribed, respectfully shows:

(1) Upon information and belief, that the Pennsylvania Gas Company is a corporation, organized and existing under the laws of the State of Pennsylvania and engaged principally in the business of

transporting and marketing natural gas. That the source of
44 supply of such natural gas to such Pennsylvania Gas Company is wholly within the State of Pennsylvania.

(2) That said Pennsylvania Gas Company markets its natural gas product, in part at least, within the State of New York, and among other places so served, is the city of Jamestown, within which city the sole source of supply of natural gas to consumers, is furnished by the said Pennsylvania Gas Company, and that each of your petitioners is a consumer of natural gas furnished by said company, and a resident of the city of Jamestown.

(3) That said city of Jamestown is a city of approximately 40,000 inhabitants, and is located in the southwesterly portion of the county of Chautauqua, State of New York, and within approximately five miles of the boundary line between the States of Pennsylvania and New York.

(4) Upon information and belief, that for a number of years past said Pennsylvania Gas Company has supplied its product to consumers within said city of Jamestown, at the price of thirty-two cents per thousand cubic feet, with a discount allowed thereon of two cents per thousand cubic feet if bills rendered therefor are paid prior to the 10th of the following month.

(5) Upon information and belief, that within the past few weeks said Pennsylvania Gas Company has filed with this Commission a new schedule of tariffs and charges to be made, to become operative May 15, 1917, and that said new schedule of tariffs is now in full force and effect. By said new schedule, so filed, said Pennsylvania Gas Company is charging and intends to charge to consumers within said city of Jamestown, for natural gas furnished, thirty-seven cents per thousand cubic feet, with a like discount of two cents
45 per thousand cubic feet, if bills rendered are paid prior to the 10th of the month succeeding the rendition thereof.

(6) Upon information and belief your petitioners further show that ever since the organization of said Pennsylvania Gas Company and its commencement of supply of natural gas to consumers within said city of Jamestown, that the returns to said company from the said consumers have been very large, aggregating many thousands of dollars annually, over and above the interest at legal rates, upon moneys invested; that within the past few years said Pennsylvania Gas Company has, upon many occasions, increased its capital stock and distributed such increase among its stockholders, in the form of stock dividends, until that at present its capital stock has increased to several times its original issue and all without further investment of moneys by its stockholders; that since its organization said Pennsylvania Gas Company has at all times paid and is now paying to its stockholders cash dividends of at least 10 per cent per annum upon all capital stock outstanding; that from time to time it has issued its bonds for large sums of money and distributed such bonds among its stockholders as a dividend and then paid and discharged such bonds in cash and that for a long term of years said Pennsylvania Gas Company has paid to its stockholders large, enormous and excessive returns over and above a reasonable return, upon capital actually invested and

ver and above reasonable reservations for surplus and contingencies, and that all such payments and returns to stockholders have been made out of moneys paid by consumers of such natural gas for gas so furnished and that such returns have so been received under prices fixed and charged prior to such attempted increase in charges so becoming operative May 15, 1917.

(7) Upon information and belief that the majority of the capital stock of said Pennsylvania Gas Company is owned by the National Fuel Gas Company, a corporation organized and existing under the laws of the State of New Jersey, and which said latter company keeps and maintains an office for the transaction of business at No. 26 Broadway, New York city.

(8) That said Pennsylvania Gas Company maintains an office at Jamestown, N. Y., upon information and belief, that its principal office is located either at No. 213 Second street, Warren, Pa., or at Oil City, Pa.

(9) Upon information and belief that the source of supply of said Pennsylvania Gas Company is at or near the city of Warren, in the State of Pennsylvania and that said city of Warren is distant from said city of Jamestown approximately twenty-two miles.

(10) That the charge heretofore made by said Pennsylvania Gas Company to its consumers in the city of Jamestown of thirty-two cents per thousand cubic feet, with a discount of two cents per thousand cubic feet, is exorbitant, and has provided and would now provide unreasonable, unjust and excessive returns to said corporation and the stockholders thereof and that said increase to thirty-seven cents per thousand cubic feet, with a discount of two cents per [thousand] cubic feet, is unjust, excessive and wholly unnecessary to provide the said corporation and its stockholders a just and reasonable return upon capital invested and to provide for reasonable reservation of income for surplus and contingencies, and that said attempted increase will result and is resulting in great hardship to the consumers, customers and patrons of said Pennsylvania Gas Company, within said city of Jamestown aforesaid.

(11) Upon information and belief, that said Pennsylvania Gas Company supplies, besides the said city of Jamestown, consumers within the village of Falconer and town of Ellicott, both in said Chautauqua county, N. Y., and the cities of Warren, Corry and Erie, in the State of Pennsylvania.

(12) That your respective petitioners have set opposite their names respectively, their places of residence, with their street number, if any.

Wherefore, your petitioners pray that this Commission investigate the matters and situation herein presented and that an order may be made upon appropriate notice to said Pennsylvania Gas Company and said National Fuel Gas Company, and after hearing and investigation of such matters, requiring and directing said Pennsylvania Gas Company to reduce its charge to consumers of natural gas within said city of Jamestown to such a sum as will accord to such consumers, gas service at a reasonable rate and allow to such corporation and its stockholders a reasonable return for

capital actually expended, after appropriate and reasonable reservation out of the income for surplus and contingencies.

All of which is respectfully submitted.

Dated May 18, 1917.

Name.	Address.
Alfred C. Davis	134 Lakeview avenue.
Samuel A. Carlson	37 Maple street.
Cheston A. Price	907 Prendergast avenue.
Merlin A. Bliss	47 Falconer street.
Alexander K. Nair	318 Van Buren street.
C. A. Call	659 East Sixth street.
William H. Anderson	13 Orchard street.
Smith Ackroyd	7 Todd avenue.
48 E. W. Henning	325 Fairmount avenue.
Joseph M. Thelander	327 Price street.
George W. Jude	310 East Eighth street.
C. W. Herrick	518 Pine street.
O. N. Rushworth	12 Lakeview avenue.
John B. Sherman	835 North Main street.
Fred R. Hemphill	207 Price street.
F. W. Gurney	1113 North Main street.
L. A. McCullough	622 Spring street.
Charles E. Lindstrom	558 Allen street.
John A. Anderson	58 Bemus street.
F. A. Nelson	23 Cedar avenue.
C. A. Fleming	400 Lafayette street.
W. W. Trumbull	1023 Jefferson street.
John M. Thomas	Gifford Building.
L. M. Drake	6 Sixteenth street.
L. F. Leonhart	1007 East Second street.
P. W. Engstrom	76 Barker street.
A. J. Lendberg	318 Newland avenue.
C. M. Johnson	35 Whitley avenue.
Frank E. Conley	1009 Crescent street.
J. W. Durham	108 Barrett avenue.
Carl W. Hermanson	139 Euclid avenue.
Edward O. Peterson	130 Water street.
F. A. Stone	519 West Third street.
C. F. Bates	117 Broadhead avenue.
G. E. Stanley	118 Church street.
A. C. Swezey	1168 Prendergast avenue.
J. M. Sweet	42 Charles street.
P. H. Perry	408 Winsor street.
Fred Pfeil	150 Falconer street.
F. F. Lockwood	558 Allen street.
Algot J. E. Larson	12 Columbia avenue.
Charles A. Anderson	40 Westcott street.
C. L. Smith	252 Fairmont avenue.
49 Charles O. Jarl	54 Lakin avenue.
R. G. Bullock	510 Clinton street.

Name.	Address.
J. Card	232 Hallock street.
H. Stone	254 Allen street.
W. Swanson	20 Orchard avenue.
G. Sampson	119 Broadhead avenue.
G. Young	347 Price street.
Nyberg	815 Newland avenue.
A. Anderson	14 Tew street.
C. Lee	39 Fifteenth street.
A. Brightman	New Gifford Building.
A. Johnson	48 Morton street.
F. Bauer	309 West Fifth street.
O. Lindholm	58 Swan street.
arl W. Leberg	406 Stowe street.
R. Jones	629 Prendergast avenue.
A. Morgan	1013 Newland avenue.
K. Hauenstein	24 Martin road.
G. Seagren	23 Chautauqua road.
C. Bush	80 Stewart avenue.
Skar	101 Lister street.
E. Leave	24 Blanchard street.
R. Strong	90 Colfax street.
Martens	33 Barrett avenue.
O. Peterson	112 Crown street.
Hegestedt	14 Bishop street.
lfred Swanson	48 Charles street.
E. Johnson	
V. Fosberg	35 Stowe street.
Burns	364 Fairmount avenue.
Feldhaus	255 Hallock street.
xel Anderson	138 McKinley avenue.
E. Peterson	30 Park street.
var C. Anderberg	16 Columbia avenue.
E. W. Bauer	8 Price street.
Axel Winzell	970 Jefferson street.
Gust A. Lofgren	102 McKinley avenue.
ert. J. Swanson	114 Stowe street.
harles Ohnstrand	37 Cross street.
G. Johnson	330 Palmer street.
Peterson	284 Prospect street.
W. Chadwick	350 Foote avenue.
an Reagan	22 Clinton avenue.
lbin Ljungren	602 Newland avenue.
eon C. Leroy	75 Baker street.
A. Carlson	47 Blanchard street.
rnest C. Probst	12 Woodworth avenue.
arl Olofson	800 Lakeview avenue.
lbert W. Edeborg	638 Winsor street.
A. E. Carlson	23 Benedict street.
lbert B. Walther	41 Maple street.

Name.	Address.
Edward Mulvehill	529 Crescent Street.
Gust Flink	452 Buffalo street.
C. P. Carlson	262 Falconer street.
John E. Dahlin	19 Hotchkiss street.
A. Hanson	112 Prospect street.
Nels Forsgren	63 Blanchard street.
William Sandberg	27 Livingston avenue.
John N. Engwall	144 Thayer street.
C. G. Lawson	326 Forest avenue.
G. Anderson	53 Beech street.
Gust Anderson	32 Colfax street.
A. F. Berg	322 Willard street.
G. A. Rose	35 Park street.
John Christofferson	50 Westcott street.
J. W. Scofield	1113 Prendergast avenue.
Harry Lindholm	55 Harris avenue.
Clark Scofield	143 Barrett street.
Alfred Lund	68 Virginia boulevard.
Ernest A. Stromdahl	239 South Main street.
51 C. F. Johnson	1131 North Main street.
C. A. Johnson	11 Stowe street.
Joseph E. Wennerstrom	10 Colfax street.
John Lindberg	88 Linwood avenue.
Otto Nelson	17 Linwood avenue.
Fritz Peterson	190 Thayer street.
Gust A. Johnson	7 Elam avenue.
Herman Carlson	107 Bowen street.
C. J. F. Engman	574 Willard street.
E. W. Anderson	28 Swan street.
A. N. Camp	313 West Fifth street.
C. J. Higgs	59 Fourteenth street.
Gust Lindstrom	615 East Sixth street.
C. A. Peterson	324 Forest avenue.
Fabian Sellstrom	611 Jefferson street.
John A. Westman	233 Curtis street.

SCHEDULE B.

(Defendant's Order to Answer.)

State of New York, Public Service Commission, Second District.

At a Session of the Public Service Commission, Second District, Held in the City of Albany on the 4th Day of June, 1917.

Present: Seymour Van Santvoord, Chairman; Wm. Temple Emmet, Frank Irvine, James O. Carr, John A. Barhite, Commissioners.

Case 6040.

In the Matter of the Complaint of ALFRED C. DAVIS and Others, of Jamestown, under Section 71, Public Service Commissions Law, against Pennsylvania Gas Company, as to Price of Natural Gas Charged Private Consumers.

The above mentioned complaint having been received and filed,

Ordered, (1) That a copy of the same be forwarded to said Pennsylvania Gas Company, and that the matters complained of be satisfied by said company, or that the charges in said complaint be answered in writing within twenty days from the service upon said company of a certified copy of this order and a copy of the complaint.

Ordered, (2) That, if the complaint be not thus satisfied, the original answer of said company shall be filed with the secretary of this Commission at Albany, and a copy of said answer shall be served by said company, either personally or by mail, upon Thrasher & Clapp, attorneys for complainants, at their office and postoffice address, Jamestown, Chautauqua county, N. Y.; that proof of such service shall be filed with the secretary of this Commission, and attorneys for complainants shall notify the secretary of receipt of a copy of said answer.

By the Commission,

[SEAL.] (Signed) FRANCIS X. DISNEY,
Secretary.

SCHEDULE C.

(*Answer in Form of Demurrer.*)

State of New York, Public Service Commission, Second District.

Case 6040.

In the Matter of the Complaint of ALFRED C. DAVIS and Others, of Jamestown, N. Y., under Section 71 of the Public Service Commissions Law, against Pennsylvania Gas Company, as to Price of Natural Gas Charged to Private Consumers.

The Pennsylvania Gas Company, the defendant named in the complaint of Alfred C. Davis and others in the above matter, which complaint was served upon said defendant, together with an order of this Commission, dated June 4, 1917, requiring defendant to satisfy the matters complained of, or serve its answer thereto within twenty days, hereby demurs to the said complaint upon the following grounds which appear upon the face thereof:

1. That the subject matter of the complaint is interstate commerce and the Public Service Commission, Second District, of the State of New York, has no jurisdiction thereof.

2. That this Commission has no jurisdiction of the subject matte of the complaint for the reason that all the gas sold by defendant t the complainants and other consumers in the State of New York produced or obtained by defendant from the source of supply wholl within the State of Pennsylvania and transported by defendant acros said State line and distributed by defendant directly to th
54 homes of such consumers in the State of New York as show by the complaint; that the transportation, distribution an sale by defendant of gas, wholly obtained in the State of Pennsy vania, to consumers in the State of New York is an act of interstat commerce; that this Commission has no jurisdiction to fix the rate or charges of such interstate commerce or commodity and no author ity or jurisdiction to require a hearing upon such rates or charges.

3. That this Commission has no jurisdiction of the person of th defendant for the reason that the defendant, engaged in the trans portation, distribution and sale of gas wholly secured from the Stat of Pennsylvania to consumers in the State of New York, is conduct ing an interstate business in which business the Federal Governmen has exclusive control and jurisdiction of the person of defendant fo the purpose of regulating rates and charges for such interstate busi ness and transportation.

4. That the complaint does not state facts sufficient to constitute cause of action or complaint against the defendant before this Com mission.

PENNSYLVANIA GAS COMPANY,
By FISHER & FISHER,
Its Attorneys.

Office and Postoffice Address, 501-504 Wellman Building, James town, N. Y.

55 SCHEDULE G.

(Order Overruling Demurrer.)

State of New York, Public Service Commission, Second District.

At a Session of the Public Service Commission, Second District, Hel in the City of Albany on the 23rd Day of August, 1917.

Present: Frank Irvine, James O. Carr, John A. Barhite, Commis sioners.

Case No. 6040.

In the Matter of the Complaint of ALFRED C. DAVIS and Others, o Jamestown, under Section 71 of the Public Service Commission Law, against Pennsylvania Gas Company, as to Price of Natura Gas Charged Private Consumers.

Alfred C. Davis and other residents of the City of Jamestown, New York, having filed a petition with this commission asking this com

ission to make an order requiring and directing the Pennsylvania s Company to reduce its charge to consumers of natural gas within d city of Jamestown to such a sum as will accord to such consumers s service at a reasonable return for capital actually expended after propriate and reasonable reservation out of the income for surplus d contingencies; and the City of Jamestown having, by an order of is commission, been allowed to intervene and become a party to said petition, and the defendant, Pennsylvania Gas Company, having filed its demurrer to said petition upon the ground that the subject matter of the petition is interstate commerce over hich subject this commission has no jurisdiction to fix the rates or harges of said interstate commerce or commodity, and no authority jurisdiction to require a hearing upon such rates or charges.

After hearing Messrs. Fisher & Fisher, as attorneys for the defendant, Pennsylvania Gas Company, in support of said demurrer, d Messrs. Thrasher & Clapp, as attorneys for the original petiners, and Cheston A. Price, Esq., corporation counsel for the City Jamestown, in opposition thereto, it is

Ordered, that the demurrer herein filed by the Pennsylvania Gas mpany be and the same is hereby overruled with leave to said mpany to answer within 20 days after the service upon it of a copy this order.

By the commission:

[SEAL.] FRANCIS X. DISNEY, *Secretary.*

J. A. B: K. A. R.
M. E. D.

SCHEDULE I.

(*Petition for Rehearing.*)

State of New York, Public Service Commission, Second District.

Case No. 6040.

the Matter of the Complaint of ALFRED C. DAVIS and Others, of Jamestown, New York, under Section 71 of the Public Service Commissions Law, against Pennsylvania Gas Company, as to Price of Natural Gas Charged to Private Consumers.

o the Public Service Commission, State of New York, Second District:

The Pennsylvania Gas Company, defendant above named, respectfully petitions this commission for a rehearing before the full mmission upon the issues raised by defendant's demurrer to the mplaint herein, which issue was determined adversely to the dendant by order of this commission dated August 24, 1917, by which der the demurrer of this defendant was overruled and defendant rected to file an answer within twenty days.

Petitioner asks for a rehearing upon the following grounds:

1. That said decision overruling defendant's demurrer is based upon a misapprehension of the jurisdiction of this commission in respect to the question involved, to-wit: The fixing of rates for the interstate transportation and sale of gas; that such jurisdiction
58 is not included in the powers conferred by statute on this commission and is denied to the state by the Federal Constitution.

2. That the memorandum opinion handed down with the decision indicates to petitioner that the aforesaid decision was based upon a misconception of certain opinions of the Federal Courts therein referred to and in particular the case of Landon as Receiver v. Public Utilities Commission of Kansas and the Minnesota Rate Case, and your petitioner desires an opportunity to present before the full commission the rule which it deems established by these cases and other cases cited in said memorandum opinion and in defendant's briefs.

3. That subsequent to the argument of the issues of law raised by the demurrer of the defendant herein, Congress enacted a law, approved August 10, 1917, conferring upon the President of the United States, during the pendency of the war, power to regulate and control the production and sale price of gas transported in interstate commerce. Petitioner believes that the effect and scope of this action of the Federal Government is not properly considered and recognized in the aforesaid decision of this commission. Petitioner urges that such action by the Federal Government, so far as the State of New York is concerned, is an express assertion of the exclusive jurisdiction of the Federal Government over the matters at bar; that the action of the Federal Government in conferring jurisdiction upon a Federal agency immediately excluded any possible jurisdiction or authority in this commission to fix rates—regardless of the action or inaction of the Federal agency in exercising the power conferred by Congress. This seems to be true even under complainants' theory of the law. Defendant does not understand complainants to
59 contend that the alleged power of the state would exist a moment after the Federal Government undertakes to exercise its paramount jurisdiction. The Federal Government has now asserted jurisdiction and the authorities, supporting its exclusive character, are not affected by the fact that the jurisdiction assumed may be temporary.

Your petitioners further pray that the provisions of the aforesaid order of this Commission of August 24th, requiring the petitioner to file its answer to the complaint in the above proceeding, be stayed pending the determination of this application.

Your petitioner further requests the privileges of making an oral argument before the full Commission upon a rehearing and to file briefs thereon.

Dated, September 19, 1917.

PENNSYLVANIA GAS COMPANY,
By FISHER & FISHER,
Attorneys.

SCHEDULE J.

(*Order Denying Rehearing.*)

State of New York, Public Service Commission, Second District.

At a Session of the Public Service Commission, Second District, Held in the City of Albany on the 27th Day of September, 1917.

Present: Seymour Van Santvoord, Chairman; William Temple Emmet, Frank Irvine, James O. Carr, John A. Barhite, Commissioners.

Case No. 6040.

In the Matter of the Complaint of ALFRED C. DAVIS and Others, of Jamestown, under Section 71 of the Public Service Commissions Law, against Pennsylvania Gas Company, as to Price of Natural Gas Charged Private Consumers.

The complainants in the above entitled proceeding having heretofore filed their petition with this commission asking that the respondent, Pennsylvania Gas Company, be required to reduce its charge to consumers of natural gas within the city of Jamestown, and said gas company having filed a demurrer to said petition upon the ground that this commission has no jurisdiction of said proceeding; and due consideration having been had and said demurrer having been overruled by the commission with leave to the respondent to answer and the respondent having thereafter filed with this commission its petition asking for a rehearing before the full commission upon the issues raised by the respondent's demurrer to the complaint, it is

Ordered, That the motion of the Pennsylvania Gas Company for a rehearing before the full commission in the above entitled proceeding be and the same is hereby denied.

By the Commission:

[SEAL.] (Signed) FRANCIS X. DISNEY,
Secretary.

SCHEDULE K.

(*Opinion of Appellate Division Dismissing Certiorari Proceeding.*)

Supreme Court, Appellate Division, Third Department.

THE PEOPLE ex Rel. PENNSYLVANIA GAS COMPANY, Relator,

against

PUBLIC SERVICE COMMISSION, SECOND DISTRICT, Defendant.

Argued November, 1917.
Decided December, 1917.

This is a proceeding by certiorari to review an order of the Publ
Service Commission, Second District, made August 23, 1917.

Appearances:

For the relator, Fisher & Fisher (M. H. Fisher, of counsel).
For the Public Service Commission, Second District, Ledyard
Hale.
For the city of Jamestown and others, Cheston A. Price an
Thrasher & Clapp (Louis L. Thrasher, of counsel).

COCHRANE, *J.*:

Numerous citizens of Jamestown presented to the Public Servi
Commission a complaint having for its object the reduction in th
price of natural gas supplied within said city by the relato
62 The Commission ordered the relator to make satisfaction
the matters alleged in the complaint or to make answer
the same. The relator demurred to the complaint on the ground tha
the Commission was without jurisdiction. The Commission mad
an order overruling the demurrer and giving leave to the relato
to serve an answer. This order the relator seeks to review by ce
tiorari.

Section 2122 of the Code of Civil Procedure prohibits a writ
certiorari "to review a determination which does not finally dete
mine the rights of the parties with respect to the matter to be r
viewed." There is no statutory provision for a demurrer before th
Commission. Section 20 of the Public Service Commissions La
directs that "all hearings before a Commission or a Commissione
shall be governed by rules to be adopted and prescribed by the Com
mission." Presumably the Commission has adopted a rule permi
ting a demurrer to a complaint or petition, but such rule is merel
for the purpose of regulating the proceeding before the Commissio
and for the more orderly and methodical conduct of the hearin
pending before the Commission. A demurrer authorized by suc
rule is a proper and desirable expedient for use before the Commis
sion, but it does not reach out beyond the Commission and deriv
any statutory or judicial recognition. The order overruling the de
murrer is in no sense a determination as that word is used in sectio
2122 of the Code of Civil Procedure. It does not finally determin
the rights of the parties nor constitute an order in the sense that i
may be reviewed by certiorari. It is merely a ruling made during th
course of a hearing before the Commission. As well might the relato
seek to review a ruling of the Commission in respect to evi
63 dence offered during the hearing. See Reade v. Halpin, 16
N. Y. Sup. 624. While the rules of the Commission seem t
provide for a demurrer, the same question might be raised by mo
tion or in any other appropriate manner during the pendency o
the hearing before the Commission. Its ruling in respect to this ques
tion stands on no different basis than its ruling in respect to othe
questions which arise at the hearing. Until the Commission makes
determnation which finally determines the rights of the parties th

lator has not sustained any grievance. The order in question overuling its demurrer does not injure or aggrieve the relator until it is llowed by some other determination or ruling affecting the price hich it seeks to charge for its product and such a determination may ver be made.

The writ should be dismissed, with $10 costs and disbursements.

Opinion of Commission.

Case No. 6040.

n the Matter of the Complaint of ALFRED C. DAVIS and Others, of Jamestown, under Section 71, Public Service Commissions Law, against Pennsylvania Gas Company, as to Price of Natural Gas Charged Private Consumers.

ARHITE, *Commissioner:*

This is a proceeding brought to compel a reduction in the price of natural gas furnished by the Pennsylvania Gas Company to the City of Jamestown and its citizens. The gas company is a Pennsylvania corporation, and conveys its product from or ar the City of Warren, Pennsylvania, across the state line to the ity of Jamestown, New York, a distance of about twenty-two miles. he defendant company files its demurrer claiming that this comission has no jurisdiction because the company is conducting an terstate business in bringing gas from Pennsylvania to New York nd that the Federal Government alone has control. This is the nly question at issue.

The defendant rests its contention to a great extent upon the case f Landon, as Receiver of the Kansas Natural Gas Company, against he Public Utilities Commission of the State of Kansas and others, ecided by the District Court of the United States for the District of Kansas on April 21, 1917, and argues with great force and ability hat the decision in that case must lead this commission to sustain he demurrer. But a careful examination of the case cited will, we hink, show that the issues there involved are essentially different om the questsion which this commission must determine. The ue tion here is whether the commission has under Sections 71 and 2 of the Public Service Commissions Law jurisdiction to fix by order, thin lawful limits, the maximum price which the defendant may harge the complainants for gas furnished to them. The term "lawful" means as much a fair and reasonable return for the service ndered as it does a price named in some statute. In the Landon se, the learned judge says: "It must be borne in mind, however, hat this suit is not one for the fixing of a rate to be charged by the laintiffs for natural gas, but it is a suit to determine whether the 28-cent rate already fixed by the commission is confiscatory; and later, "It is accordingly held that the 28-cent rate is not and will not be compensatory, but on the contrary that it is

unreasonably low and confiscatory, and violative of the Constituti of the United States." The four separate findings of the court a based upon the conclusion that the rates involved were either no compensatory, unreasonably low, and confiscatory, or were an attem directly and unduly to burden and regulate interstate commerc The court further says that if the rate is not confiscatory the meth adopted by the commission is immaterial.

If the learned judge was not clearly of the opinion that the que tion before him was not whether the State of Kansas had the rig to fix any rate at all, however fair and just that rate might be, b whether the state had the right to fix a rate that was confiscatory an unduly burdened interstate commerce, and was a violation of th Constitution of the United States, it is quite impossible to unde stand why he used so many pages of his able opinion in discussin the rates imposed and manner in which those rates were determine

In the same case, 234 Federal Reporter 152, upon the motion fo a preliminary injunction before an enlarged court, it was held tha gas procured in Oklahoma and transported and sold or delivered t parties in Kansas or Missouri is an article of interstate commerce and further, that enforcement by a state through its officers *or* an legislative act preventing interstate commerce in this article, eithe by a direct prohibition of such commerce by state laws or by an inhi bition of the sale of the article in a state at any price whatever, or a

> any price above a price so low that the laws of trade mak
> 66 it impossible to purchase or procure it in another state an
> to sell and deliver in the prohibiting state at that price wit

profit, substantially burdens and unduly interefer-s with interstat commerce in violation of the commerce clause of the Constitution o the United States.

Nowhere in the Landon case is it held, nor can a proper conclusio be drawn from the opinion in that case, that New York state has no a right to fix a proper price for natural gas brought from anothe state and sold within the borders of New York state.

The complainants do not ask this commission to prohibit or t interfere with the flow of gas across the state line, or to prevent i sale within the state, or to fix a price less than that which will rende a fair and reasonable profit. Not until one of those things is don or the commission takes the prohibitive action, is the Landon ca an authority against the jurisdiction of the commission to act upo the application of the petitioners.

It is conceded by the petitioners that the flow of gas from on state to another through a pipe line is inter-state commerce, but th fact does not prevent the state from controlling, within legal limit the price at which the commodity may be sold within the limits of th state.

The interstate commerce law provides that the act shall not appl to the transportation by pipe lines of natural or artificial gas: Se tion 1. Congress has thus refused to subject natural gas to the con trol of the Federal authorities. But this refusal does not necessaril place the control of the transportation of gas from one state to an other within the control of the states. When the subject is local i

its nature or sphere of operation, and can be properly regulated by special measures adopted to a particular locality, the state can act until Congress assumes control; but when the subject is national in its character and requires uniformity of regulation affecting alike all the states, Congress can alone act and provide the needed regulations. The absence of any law of Congress on the subject is equivalent to its declaration that commerce in that matter shall be free and that importation into the state shall be unrestricted. Bowman v. Chicago Railroad Company, 125 U. S. 507; opinion of Mr. Justice Field.

The court, however, in the Bowman case, opinion of Mr. Justice Matthews, holds that in the matter of commerce between states the same inference is not always to be drawn from the absence of congressional legislation as might be in the case of commerce with foreign nations, and that the question may therefore be considered in each case as it arises; whether the fact that Congress has failed in the particular instance to provide by law a regulation of commerce among the states is conclusive of its intention that the subject shall be free from all positive regulations, or that until it positively interferes such commerce shall be left free to be dealt with by the respective states.

Has Congress intended to leave to the states affected the regulations necessary to control the trade in gas? The control of this product is not one which is of interest to the whole country. The area which produces it is comparatively small. In the same sense the distance it may be conveyed with profit is short. For commercial purposes, but one method of transportation is possible—by pipe lines. The source of supply is continually changing and varies in amount. It is used for light, heat and power under different conditions and for different purposes. In some cases, where the gas is transported a long distance, the charge for its use may be composed largely of items which arise from the cost of transportation. In the Landon case, supra, the court calls attention to the fact that the Utilities Commission in fixing a rate divided the property into two parts; namely, that used in production and that used in transportation, and then used only the valuation of the latter as a basis in determining the cost to a consumer, thus making the rate fixed a transportation rate and clearly a burden upon interstate commerce.

It seems unnecessary to discuss the numerous cases in which the state has been allowed to assume the regulation of matters which concern the welfare of its citizens in the absence of congressional action, although such matters directly or indirectly affect interstate commerce. With regard to the special subject of our discussion, we find that the court in Jamieson v. Indiana Natural Gas and Oil Company, 128 Indiana 555, holds that natural gas is a local product, and that its production is confined to a limited locality; that it is a proper subject for state legislation, and that it does not require a uniform system as between the states for its regulation.

In Manufacturers Light and Heat Company v. Ott, 215 Fed. Rep. 940, it is held that the fixing of rates for natural gas within the

state is a proper state regulation although the product may be produced in another state; that Congress having taken no action, it is clearly within the power of the state legislature to protect its own citizens against excessive charges.

In Minnesota Rate Cases, 230 U. S. 352, the court discusses
69 the conditions under which the states may act, although the subject of their action is connected with or indirectly affects interstate commerce. It says, page 399: "It has repeatedly been declared by this court that as to those subjects which require a general system or uniformity of regulation the power of Congress is exclusive. In other matters admitting of diversity of treatment according to the special requirements of local conditions, the states may act within their respective jurisdictions until Congress sees fit to act." Again, page 402: "It is competent for a state * * * to adopt protective measures of a reasonable character in the interest of the health, safety, morals, and welfare of its people, although interstate commerce may incidentally or indirectly be involved. * * * Where the subject is peculiarly one of local concern and from its nature belongs to the class with which the state appropriately deals in making reasonable provisions for local needs, it cannot be regarded as left to the unrestrained will of individuals because Congress has not acted."

It may be noticed that in the law recently enacted by Congress as a war measure for the control and conservation of foods and fuel, natural gas is named as one of the necessities of life and put under the control of the president. But taking into consideration the peculiar purpose for which that act was passed, it may be said that at least until the president does act, the ordinary control of rates at which this fuel must be sold is not taken away from the commission.

The demurrer must be overruled.

Commissioners Irvine and Carr concur; Chairman Van Santvoord and Commissioner Emmet not present.

70 *Answering Affidavit, L. L. Thrasher.*

State of New York, Public Service Commission, Second District.

Case No. 6040.

In the Matter of the Petition of ALFRED C. DAVIS and Others for a Reduction in Gas Charges to the Consumers within the City of Jamestown, New York, for Natural Gas by Pennsylvania Gas Company.

STATE OF NEW YORK,
Ulster County, ss:

Louis L. Thrasher, being duly sworn, says that he resides at Jamestown, New York, and is one of the law copartners of Thrasher & Clapp, attorneys and counsel for the petitioners in the proceeding mentioned in the above-entitled action as having been instituted

against the Pennsylvania Gas Company, and before the Public Service Commission, Second District. That deponent has his office for the practice of law at 504 Fenton Building, Jamestown, New York. Deponent further says that on January 22, 1918, Messrs. Fisher & Fisher served upon deponent's said law firm, pursuant to the order of said Public Service Commission, referred to in the petition in this proceeding, an answer, answering the petition so theretofore filed with the Public Service Commission, against said Pennsylvania Gas Company.

71 Deponent further says that a copy of said answer so served is hereto atached, hereby referred to and made a part and parcel of this affidavit.

LOUIS L. THRASHER.

Sworn to before me this 2d day of February, 1918.

W. H. GROGAN,
Notary Public.

Original filed Apr. 22, 1918.
C. K. LOUGHRAN,
County Clerk of Ulster Co.

Answer of Pennsylvania Gas Company.

State of New York, Public Service Commission, Second District.

Case No. 6040.

In the Matter of the Petition of ALFRED C. DAVIS and Others for a Reduction in Gas Charges to the Consumers within the City of Jamestown, New York, for Natural Gas by Pennsylvania Gas Company.

The Pennsylvania Gas Company, defendant above named, answering the complaint herein:

First. Admits the allegations set forth in Paragraphs (1), (2), (3), (4) and (5), except that it denies that the city of Jamestown is located approximately five miles from the boundary line between the States of Pennsylvania and New York.

Second. Answering the paragraph numbered (6), denies:

(*a*) That ever since its organization and its commencement of supply of natural gas to consumers within said city of James-
72 town the returns to it from said consumers have been very large, considering the fair and reasonable value of its property used and useful in producing and furnishing natural gas to said consumers and the fair and reasonable value of the gas and service so furnished, but it admits that said returns aggregate many thousands of dollars annually over and above the interest at legal rates upon moneys originally invested. It avers, however, that money invested does not furnish any fair, reasonable or lawful criterion or

basis for fixing rates chargeable by a natural gas company, for the reason, among others, that a large part of the property of the natural gas company consists of lands and leaseholds from which it produces gas; that a very large amount of money invested in gas-producing lands and leaseholds in good faith, on the best judgment of men most experienced and skilled in the business may, and frequently does, produce but very little or no gas, whereas, on the other hand, a small amount of money similarly invested may fortunately find and produce daily very large quantities of gas from wells which have great staying quality, and thus give great value to properties which had little or no value before.

(*b*) The defendant admits that it has on several occasions increased its capital stock, such increase among its stockholders being in the form of stock dividends, so that at present its capital stock has increased to several times its original issue, but denies that this has all been done without further investment of moneys by its stockholders; and for further answer to such allegations the defendant avers that a part of such increases in the capital stock was made in cash paid into the treasury of said corporation at par; that a part thereof was made for property purchased by the corporation in good faith which property was valuable and necessary to the cor-
73 poration in the performance of public functions, and was of the fair and reasonable value of the amount of stock issued therefor; that a part thereof was issued for increase of value of the gas-producing lands and property owned by said company over and above the cost of said gas-producing land, which increase was due to the fortunate finding and development of natural gas thereon in great quantities, etc.; and a part thereof was issued from net earnings of the company which were properly distributable to the stockholders as dividends and which the stockholders reinvested and permitted to be and remain permanently in said corporation; that all of said profits and earnings were lawful, and that the property and assets of said defendant used and useful in producing and supplying gas to the public is and always has been of a fair and reasonable value in excess of the amount of said capital stock; that all of said increases of capital stock was fair and lawful under the laws of Pennsylvania under which said increases were made.

(*c*) The defendant denies that it has at all times since organization paid to its stockholders cash dividends of at least 10 per cent per annum upon the capital stock outstanding, but admits that it is now paying dividends amounting to 10 per cent per annum upon its capital stock and for several years past has been paying such rate of dividend upon its outstanding capital stock.

(*d*) The defendant denies that from time to time it has issued its bonds for large sums of money and distributed such bonds among its stockholders as a dividend and then paid and discharged said bonds in cash, but admits that it did so upon one occasion since the organization of the corporation.

74 (*e*) The defendant denies that for a long term of years it has paid to its stockholders large, enormous and excessive re-

rns over and above a reasonable return upon capital actually in-sted and over and above reasonable reservations for surplus and ntingencies, and avers that all such returns paid to its stockholders re fair, reasonable and lawful, having due regard to the fair and asonable value of the property of the defendant used and useful producing natural gas and furnishing the same to the public, and e fair and reasonable value of the gas and service so furnished.

(f) And the defendant further denies that all such payments and turns to stockholders have been made out of moneys paid by con-mers of such natural gas for gas so furnished, but avers that a large rt of such returns have resulted from the increased value of gas-oducing lands and properties over the original cost thereof.

Third. Answering the allegations contained in the seventh para-aph of the complaint, the respondent is advised by legal counsel d avers that the ownership of its capital stock is immaterial and t relevant to the issues raised in this case.

Fourth. The defendant admits that it maintains an office at James-wn, New York, and avers that its principal office is located at 213 cond avenue, Warren, Pennsylvania.

Fifth. The defendant denies that its source of supply of natural s is at or near the city of Warren, and avers that it obtains its sup-ly of gas from the counties of Elk, McKean, Warren and Forest, in e State of Pennsylvania, that its principal source of supply lies in gas fields in Elk county, the center of which field is approxi-mately thirty-four (34) miles from Warren, and from Mc-Kean county, the center of which gas field is approximately enty-two (22) miles from Warren. The defendant admits that e distance from the city of Warren to the city of Jamestown is ap-oximately twenty-two (22) miles.

Sixth. The defendant denies the allegations contained in the tenth aragraph of the complaint, and in further answer thereto the de-ndant avers that the production of natural gas is necessarily a haz-rdous and uncertain business; that the increased rate complained f is less than natural gas is worth in comparison with the cost and alue of other substitute commodities used for fuel and light in the me territory; that the increased rate complained of produces a re-rn to the defendant that is less than is fair and reasonable, and less an the defendant is entitled to receive upon its capital stock or upon e value of its property used and useful in supplying gas to the ublic; that the rate complained of produces a return upon said pital stock and upon a fair and reasonable valuation of the plant d property of the defendant, such that after due and proper allow-nce is made for depletion of the defendant's gas lands and depreciа-on of its pipe lines and other property and with due compensation r the extraordinary risks of the business and skill in the manage-ent and conduct of its affairs, the net return to the defendant does ot exceed the legal rate of interest. The defendant further avers hat within the past year or year and a half there has been such an traordinary increase in the cost of the necessary labor and materials ed in the operation and conduct of its business that the returns re-

sulting to it from the increase of rate complained of will not compensate it for the increased expense and cost of its operation and service.

76 Seventh. The matters set out in paragraph eleven of the complaint are admitted.

Eight-. The matters set out in paragraph twelve of the complaint are admitted.

Ninth. The defendant further alleges that this Commission has no juri-diction of the subject matter of the complaint, for the reason that all of the gas sold by the defendant to the complainants and others, consumers in the State of New York, is obtained and produced by the defendant wholly within the State of Pennsylvania and transported by the defendant across said State line and distributed by the defendant directly to the homes of said consumers in the State of New York; that the transportation, distribution and sale of gas by defendant, obtained wholly within the State of Pennsylvania to consumers in the State of New York is an Act of Interstate Commerce; that under the Constitution and Laws of the United States this commission has no jurisdiction to fix the rates or charges of such interstate commerce or commodity and no authority or jurisdiction to require a hearing upon such rates and charges; that the subject matter involved is a matter in which the Federal government has exclusive control and jurisdiction and that the Federal government has assumed such control and jurisdiction.

Wherefore, the defendant company demands that the complaint herein be dismissed.

Jan. 21st, 1918.

PENNSYLVANIA GAS COMPANY,
By H. H. McCONNELL, *Treasurer.*

Original filed April 22, 1918.
C. K. LOUGHRAN,
County Clerk of Ulster Co.

77 *Order Granting Writ.*

At a Special Term of the Supreme Court, Held at the Court-house, in the City of Kingston, in the County of Ulster, in and for the Third Judicial District, on the 2nd Day of February, 1918.

Present: Hon. Gilbert D. B. Hasbrouck.

Supreme Court, State of New York.

In the Matter of the Application of PENNSYLVANIA GAS COMPANY for a writ of prohibition, directed to the Public Service Commission, Second District, of the State of New York, and to Alfred C. Davis, the City of Jamestown, and Others, Complainants in a proceeding pending before said Commission entitled: In the Matter of the Complaint of Alfred C. Davis and Others, of Jamestown, N. Y., under Section 71 of Public Service Commissions Law, against Pennsylvania Gas Company, as to price of Natural Gas charged to private consumers, Case No. 6040.

On reading and filing the petition of Pennsylvania Gas Company, duly verified on the 21st day of January, 1918, and the notice of motion attached thereto, and due proof of service thereof upon the Public Service Commission, Second District, and the complainants in the original proceeding, having been filed, and on motion of Fisher & Fisher, attorneys for the petitioner, it is

78 Ordered, that an alternative writ of prohibition issue out of and under the seal of this court directed to the public Service Commission, Second District, of the State of New York, and to Alfred C. Davis, the City of Jamestown and others, commanding them and each of them, their agents and attorneys, to desist and refrain from taking any further proceedings or action in a proceeding pending before said Commission entitled: "In the Matter of the Complaint of Alfred C. Davis and others, of Jamestown, New York, under section 71 of the Public Service Commissions Law, against Pennsylvania Gas Company as to price of natural gas charged to private consumers, Case No. 6040," or with respect to such proceedings until further direction of the court; and further requiring them and each of them to show cause at a term of this court to be held in and for the Third Judicial District at the Court House in the city of Kingston, in the county of Ulster, on the 6th day of April, 1918, at the opening of court on that day, why they should not be absolutely restrained from any further proceedings in the aforesaid matter.

Enter:

G. D. B. HASBROUCK,
Justice Supreme Court.

Original filed Mar. 8, 1918.
C. K. LOUGHRAN,
County Clerk of Ulster Co.

STATE OF NEW YORK,
Ulster County Clerk's Office, ss:

I, C. K. Loughran, Clerk of the county of Ulster, and also Clerk of the Supreme Court, in and for said county, do hereby certify that I have compared the preceding copy order (original filed March 8, 1918) with the original on file in this office, and that the
79 same is a correct transcript from said original order and of the whole thereof.

In witness whereof, I have hereunto set my hand and affixed the seal of said Court and County, this 8th day of March, 1918.
[L. S.] C. K. LOUGHRAN, *Clerk.*

Writ of Prohibition.

Supreme Court, State of New York.

The People of the State of New York on the Relation of Pennsylvania Gas Company to the Public Service Commission, Second District of the State of New York, and to Alfred C. Davis, the City of Jamestown, and others, complainants in a proceeding pending before said Commission entitled: "In the Matter of the Complaint of Alfred C. Davis and others, of Jamestown, New York, under Section 71 of the Public Service Commissions Law, against Pennsylvania Gas Company, as to price of natural gas charged to private consumers, Case No. 6040," Greeting:

Whereas, at a Special Term of the Supreme Court, held at
80 the Court House in the city of Kingston, county of Ulster, on the second day of February, 1918, the Pennsylvania Gas Company, by petition duly verified the 21st day of January, 1918, made known to this court that the Public Service Commission, Second District, of the State of New York, has assumed jurisdiction in the above entitled proceeding, instituted before it on the complaint of Alfred C. Davis and others, against the Pennsylvania Gas Company, and has made orders therein requiring the said Pennsylvania Gas Company to satisfy the matters complained of by reduction of rate or answer the complaint, and by subsequent orders overruled the demurrer of said Gas Company, and again ordered it to appear and answer in said proceeding.

Now, therefore, that justice may be done in the premises, and it appearing that adequate relief can only be had by a writ of prohibition restraining you and each of you from taking any further proceedings or action in the matter hereinbefore set forth, we therefore command you, the said Public Service Commission, Second District, State of New York, and you, the said Alfred C. Davis, city of Jamestown and others, the complainants in the original proceeding before the said Commission, and each of you, your agents and attorneys, to desist and refrain from taking any further proceedings or action in the proceeding pending before said Public Service Commission, Sec-

d District, entitled: "In the Matter of the complaint of Alfred C. avis and others, of Jamestown, New York, under section 71 of the ublic Service Commissions Law, against Pennsylvania Gas Com- any as to price of natural gas charged to private consumers, Case No. 6040"; or with respect to such proceeding, and to desist and refrain from requiring said Pennsylvania Gas Company to appear or attend a hearing in said proceeding, all until rther direction of this court.

And that you and each of you show cause before this court, at a ecial Term thereof, to be held at the Court House in the county f Ulster, on the 6th day of April, 1918, at ten o'clock in the fore- oon, why you and each of you shall not be absolutely restrained om any further proceedings in the matter hereinbefore set forth.

Witness: The Honorable Gilbert D. B. Hasbrouck, one of the jus- es of the Supreme Court, at the Court House in the county of Ulster, is 2d day of February, 1918.

By the court:

C. K. LOUGHRAN, *Clerk.*

The within writ is hereby allowed.

Dated February 28, 1918.

G. D. B. HASBROUCK,
Justice of the Supreme Court of the State of New York.

Original filed Mar. 14, 1918.

C. K. LOUGHRAN,
County Clerk of Ulster Co.

Opinion of Hasbrouck, J.

State of New York, Supreme Court, Chautauqua County.

Case No. 6040.

n the Matter of the Application of PENNSYLVANIA GAS COMPANY for a writ of prohibition, directed to the Public Service Commission, Second District, of the State of New York, and to Alfred C. Davis, the City of Jamestown, and Others, Complainants, in a proceeding pending before said Commission entitled: In the Matter of the Complaint of Alfred C. Davis under Section 71 of Public Service Commissions Law, against Pennsylvania Gas Company, as to price of Natural Gas charged to private consumers, Case No. 6040.

Fisher & Fisher, Esqs., Attorneys for Petitioner.

Appearances:

Fisher & Fisher, Esqs., attorneys for petitioner.
Hon. Ledyard P. Hale, counsel for Public Service Commission, econd District.
Thrasher & Clapp, Esqs., attorneys for original complainants.
L. L. Thrasher, Esq., of counsel.

Mem.

HASBROUCK, *J.:*

On May 31, 1917, Alfred C. Davis and others, consume
83 of gas in Jamestown, New York, filed a petition with t
Public Service Commission, Second District, complaining
an increase of rate in the sale of gas by the Pennsylvania Gas Co
pany, a foreign corporation. The Commission required the G
Company to satisfy the complaint or answer. The Gas Compan
filed a demurrer challenging the jurisdiction of the Commissio
The Commission overruled the demurrer, holding the subject to
within its cognizance. The Gas Company then sued out a writ
certiorari to the Appellate Division of the Supreme Court to revie
the determination of the Commission. The writ was dismissed
the Court upon the grounds that the writ would not lie to review an
other than a final determination, and that the order of the Commi
sion overruling the demurrer was not a determination susceptible
review under Sec. 2122 of the Code of Civil Procedure, 168 A.
59. After such determination of the certiorari proceeding the G
Company noticed an application to the Supreme Court for an alte
native writ of prohibition to restrain the Public Service Commissio
of the Second District from proceeding upon further the petition
the consumers.

The claim of the relator is that the subject of the petition is inte
state commerce, and that it is of such a character that it lies e
clusively within the jurisdiction of Congress to regulate, and is pr
tected from regulation by the State by the commerce clause of t
constitution.

The Public Service Commission, the respondent, answers:

1. That the relator having elected a proceeding in certiorari is d
barred the use of prohibition.

These writs are very dissimilar. The great function of the writ
certiorari is appellate. It runs from a superior to an inferi
84 tribunal to correct its determinations. It comprehends an
error susceptible of review. While the writ of prohibition wi
never lie to review a determination or act as a proceeding in appea
nor will it lie in contemplation of any conduct on the part of a
interior judicial tribunal save that of jurisdiction. The sole functi
of the writ is to prevent, interrupt or restrain the exercise on th
part of an inferior tribunal of a jurisdiction beyond its power
Certiorari was not open as a remedy to the relator at the time of i
invocation. A very different situation arises where the suitor
called on to determine whether he shall sound his action in contra
or in tort. It is quite clear in proceeding in certiorari to review th
determination of the commission upon the demurrer that there w
no election. There was a mistake only in the selection of the remed
The relator was not thereby precluded from seeking relief throug
another or apparently inconsistent remedy.

McNutt v. Hilkins, 80 Hun. 238.

Shanahan v. Coburn, 128 Mich. 692, 15 Cyc. D. page 262.

It is urged, too, that though certiorari was used, it was used prematurely, and a remedy open to the relator when the respondent shall have determined the complaint of the citizens of Jamestown. This is undoubtedly correctly claimed. But in order that a determination might be made we may assume the necessity of pleadings, the introduction of evidence showing the expenses of production, transportation and delivery and involving the cost of a hearing and the consumption of time. It is just such a situation which inspired the Court of Appeals to declare that the use of the writ should not

> be abridged by technical rules, since it was "far better to prevent the exercise of unauthorized power than to be driven to the necessity of correcting the error after it had been committed."

Quimbo Appo. v. The People, 20 N. Y. 542.

It needs no argument to demonstrate that under the circumstances, if the case be a proper one for the perpetration of the writ, that such course be taken rather than that the relator should be relegated to certiorari at the end of a long and expensive trial.

2. That the Public Service Commission has power to fix the price of natural gas in Jamestown even though the transaction is the sale by a citizen of Pennsylvania to a citizen of New York.

Under the law of the State of New York creating Public Service Commissions, they are empowered to fix the price at which gas, natural and artificial, may be sold to the public. Laws of 1907, chap. 429, sec. 71.

This power of the State has no limitation except it should be uniform and not confiscatory, and not offensive to the interstate commerce clause of the constitution. There is no question arising out of the application at bar except that the action sought to be had by the Commission is claimed to be a burden or restriction upon such commerce. The facts do not present a case where the Commission has gone beyond the entertainment of the proceeding. There exists, however, the threat of the exercise of the power to fix a rate at which the relator may sell natural gas to the consumer of Jamestown. It might well turn out that the Commission would hold that the rate established by the Gas Company was a reasonable and just rate and under such

> circumstances no grievance would lie with the relator against any action of the Commission. We may, however, under the proceedings before the Commission wherein the power to fix the rate is asserted, assume that if it should find the rate excessive and unjust, the Commission would order a lower rate than that fixed by the Company.

Speaking on a kindred subject and to the point under discussion, Chief Justice Marshall said, and it is pertinent to the facts upon the application at bar:

"It will not meet this argument to say that this state of things will never be produced, that the good sense of the states is a sufficient security against it. The constitution has not confided this subject

to that good sense; it is placed elsewhere. The question is, where does the power reside? Not how far will it probably be used."

Brown v. Maryland, 12 Wheaton 419.

It thus appears that the exercise of power by the Commission upon the rates made by the Gas Company in the State of New York would constitute interference with such commerce in the nature of a burden or restriction even if any discrimination should not exist. And interference, burden or restriction are quite as obnoxious to such commerce as discrimination itself.

Wabash, etc., Railway Co. v. Illinois, 118 U. S. 575.
Rosenberger v. Pacific Express Co., 241 U. S. 48.
Greek-American Sponge Co. v. Richardson Drug Co., 124 Wis. 475.

The inquiry becomes immediately pertinent as to whether
87 sales made by the relator of gas produced in the State of Pennsylvania to citizens of Jamestown, New York, constitute interstate commerce. Upon this subject the authorities leave no room for doubt. Such sales constitute interstate commerce.

State ex rel. Corwin v. Ind. Gas Co., 120 Ind. 575.
Haskall v. Cowham, 187 Fed. Rep. 403.
Landon v. Pub. Utilities, 242 Fed. Rep. 682.
Minnesota Light & Heat Co. v. Ott. 215 Fed. 940.

The claim of the respondent is that, though such sales constitute interstate commerce, Congress has never legislated upon the subject of the sale of gas as of national concern, and that, therefore, the power resides in the states so to do. This contention has been well made in every instance where the subject of the legislation was a matter of local concern and but incidentally or indirectly affected interstate commerce. Mr. Justice Hughes has pointed out in the Minnesota Rate Cases, 230 U. S., pages 403-411, subjects upon which it was competent for the states to legislate even though interstate commerce was indirectly affected. The question, therefore, to be determined here is whether the sales of gas, the price of which is sought to be regulated, is a matter of national or of local concern. For it must be admitted that if the matter is one of national concern, subject to action by Congress establishing a uniform regulation, that then and in such case without any legislation by Congress the subject is beyond the pale of the State. This doctrine, after much contention in the United States Supreme Court and the expression of
divergent views covering many years, was at last, in the over-
88 turning of the Peik case, 94 U. S. 177-8 see Minnesota Rate Case, 230 U. S. 414, finally and permanently established by the United States Supreme Court.

"And the question now under consideration whether these statutes (referring to the State Freight Tax cases, 15 Wallace 232) were of a class which the legislatures of the states could enact in the absence of any act of Congress on the subject was considered and decided in the negative. * * * It cannot be too strongly insisted upon that the

right of continuous transportation from one end of the country to the other is essential in modern times to that freedom of commerce from the retraints which the states might choose to impose upon it that the commerce clause was intended to secure * * * it would be a very feeble and useless provision, but poorly adapted, to secure the entire freedom of commerce among the states * * * if at every stage of the transportation of goods and chattels throughout the country the State within whose limits a part of this transportation must be done could impose regulations concerning price compensation or taxation or any other restrictive regulation interfering with and seriously embarrassing commerce."

Wabash v. Illinois, 118 U. S. 575.

The Wabash case, which has remained the law, treated of the right of the State to legislate upon the rates charged by railroads in interstate transportation.

Whether the legislation of the State be directed to the charges of the interstate common carriers or to the taxation of the instruments of such commerce by a direct or indirect imposition or by license, such acts from any aspect are not more offensive to the interstate commerce clause than an act which undertakes to set a price upon the commodity of the resident of another State sold in this State. If a price may be set by State Legislatures or Commissions upon gas it may be set upon coal, oil, potatoes, tobacco, wheat or upon any other commodity. To say that sales of such commodities are local because they find production in localities or are offered for sale in localities, is entirely to misapprehend the meaning of the language of our national court of last resort. The cases reported in the books show that natural gas is the product of several states.

89

120 Ind. 575; 187 Fed. Rep. 403; 242 Fed. Rep. 682; 215 Fed. Rep. 940.

It, therefore, could have been made—though it was not by the commerce act of Congress February 4, 1887, as amended—the subject of national legislation.

An act may be said to be national in respect of commerce when it involves the right of exchange or trade among the states. It is not dwarfed into local significance simply because the gas is impounded in a certain district in Pennsylvania and sold in a municipality in New York. The place of sale of the commodity is not what fixes the character of the transaction, it is fixed rather by the nature of the transaction itself.

"That portion of commerce with foreign countries and between the states which consists in transportation and exchange of commodities is of national importance and admits and requires uniformity of regulation."

Wettore v. Missouri, 91 U. S. 280.
Wabash v. Illinois, supra.

"It needs no argument to show that the commerce with foreign nations and between the states which consists in the transpor-
90 tation of persons and property between them is a subject of national character, and requires uniformity of regulation."

Glucester Ferry Co. v. Pa., 114 U. S. 196-204.
Leisy v. Harden, 135 U. S. 100.
Kirkmyer v. Kansas, 236 U. S. 568.

Speaking directly to the point, Sanborn, J., for the Circuit Court of Appeals, Eight- Circuit, says:

"Interstate commerce in natural gas, including therein its transportation among the states by pipe line, is a subject national in its character and susceptible of regulation by uniform rules."

Haskell v. Cowham, 187 Fed. Rep. 408.

This case was followed in Landon v. Public Utilities Co., 242 Fed. Rep. 685, where District Judge Booth says:

"Nor is the business carried on by the receiver, though interstate commerce in character, of such inherent local nature that it is subject to the regulation and control that is sought to be imposed by the state in the instant case."

In weight of authority and reason, the foregoing cases seem vastly superior to the case of Manufacturers Light & Heat Company v. Ott, 215 Fed. Rep. 945. The decision in that case proceeded upon the theory that the regulation of charges for the sale of natural gas produced in one State and sold in another was a mattter of a local concern, unlegislated upon by Congress, quoting only, in support of the contention of the writing Judge, the Minnesota Rate Case.

The general rule determining what character of act upon the part of the State is local, and what national is stated in the Rate Case with comprehensive accuracy.

91 But in the whole catalogue of specifications there found there is not one which constitutes authority for the State containing the market to fix the price of the foreign commodity which has not yet been added to the general mass of the property of that State.

It follows that an alternative writ of prohibition should be granted, restraining further proceedings upon the part of the respondent.

Original filed, Apr. 22, 1918.
C. K. LOUGHRAN,
County Clerk of Ulster Co.

92 I, J. Newton Fiero, Official Reporter of the State of New York, do hereby certify that the attached copy of the opinion of the Court of Appeals of the State of New York, in the case entitled "In the Matter of the Application of the Pennsylvania Gas Company, Appellant, for a Writ of Prohibition against The Public Service Commission, Second District, et al., Respondents," opinion written by Judge Cardozo, and handed down on January 28, 1919, is a true and correct copy of the opinion of said Court of Appeals in

such case; that the attached copy is in the exact form in which that opinion is printed and will appear in the current week's Advanced Sheets of the Official Reports entitled "New York Reports," volume 225, "Court of Appeals."

ALVAH S. NEWCOMB,
Deputy State Reporter,
Court of Appeals Hall, Albany, N. Y.

Dated, March 24, 1919.

I hereby certify that Alvah S. Newcomb is the Deputy State Reporter and that his signature attached to the above Certificate is genuine.

In witness whereof, I have hereunto set my hand and affixed the seal of said Court at the City of Albany in the State of New York this 24th day of March A. D. 1919.

[Seal State of New York Court of Appeals.]

R. M. BARBER,
Clerk Court of Appeals.

93 In the Matter of the Application of PENNSYLVANIA GAS COMPANY, Appellant, for a Writ of Prohibition against Public Service Commission, Second District, et al., Respondents.

94-95 Appeal by permission, from an order of the Appellate Division of the Supreme Court, in the third judicial department, entered September 30, 1918, which reversed an order of Special Term granting a motion for a writ of prohibition.

The facts, so far as material, are stated in the opinion.

Marion H. Fisher and John E. Mullin for appellant.

96 Ledyard P. Hale for Public Service Commission, respondent.

Louis L. Thrasher and Robert H. Jackson for Alfred C. Davis et al., respondents.

97 CARDOZO, *J.*:

The Pennsylvania Gas Company is a Pennsylvania corporation which supplies natural gas to the inhabitants of the city of Jamestown. Its gas fields and wells are in Pennsylvania, and its gas is conveyed to Jamestown through pipe lines. About forty-five miles of line are in Pennsylvania and about five in New York. It has a branch office in Jamestown, and its mains and pipes are in the city's streets. Formerly its rates for gas were thirty cents a thousand. Recently it attempted to raise its rates to thirty-five cents, and filed a schedule with the public service commission accordingly. A citizen of Jamestown, alleging that the new rates were exorbitant, lodged a complaint with the commission. The gas company was
98 directed to answer the complaint. It filed with the commission a demurrer to the jurisdiction which the commission

overruled. Thereupon the company sued out a writ of prohibition. Its petition alleges that the attempted regulation of its rates is an unconstitutional interference with interstate commerce. The writ was granted at Special Term, and vacated at the Appellate Division. An appeal to this court followed.

(1). We think the petitioner's business is interstate commerce. There is no doubt that the transportation of oil or gas from state to state through the medium of pipe lines is commerce between the states (West v. Kansas Natural Gas Co., 221 U. S. 229; Haskell v. Kansas Natural Gas Co., 224 U. S. 217; Haskell v. Cowham, 187 Fed. Rep. 403). It is true that there is a distinction to be noted. What is regulated by this statute (Public Service Commissions Law [Cons. Laws, chap. 48], sec. 65) is not, the act of transportation; it is the sale of the thing transported (Manufacturers' Light & Heat Co. v. Ott, 215 Fed. Rep. 940, 944). But the sale of commodities to be delivered by the seller in one state to the buyer in another is also interstate commerce (Leisy v. Hardin, 135 U. S. 100; Savage v. Jones, 225 U. S. 501; Int. Paper Co. v. Mass., 246 U. S. 135). It is, therefore, subject, like the business of transportation, to the power of the nation. Interstate commerce does not end until the subject-matter of the sale has been broken up or redistributed or absorbed in the common mass of property within the state (Leisy v. Hardin, supra). When that moment arrives, is not always easy to determine. The test to be applied will vary with the method of transportation and the subject of the sale. The keg of beer transported from one state to another is withdrawn from interstate commerce when its contents are sold by the glass (Leisy v. Hardin, supra). To

99 bacco, imported in bulk, becomes subject to the plenary power of the states when the bulk is broken and the tobacco sold at retail (Rast v. Van Deman & Lewis Co., 240 U. S. 342, 362; Armour & Co. v. North Dakota, 240 U. S. 510, 517). But the rule of the "original package" is not an ultimate principle. It is an illustration of a principle. It assumes transmission in packages, and then supplies a test of the unity of the transaction. If other forms of transmission are employed, there is need of other tests (Mutual Film Corp. v. Ohio Ind. Comm., 236 U. S. 230, 241; Hall v. Geiger-Jones Co., 242 U. S. 539, 558). The telegram forwarded by the stock exchange in New York to the telegraph company in Boston with the intention that the company shall transmit it to selected brokers, approved in advance by the exchange, does not lose its character as a subject of interstate commerce until it reaches the brokers' offices (W. U. Tel. Co. v. Foster, 247 U. S. 105). The continuity of the transaction is not broken by the translation of the code message into English; by its transmission, thus translated, to subscribers; not even by the option, reserved by the telegraph company, to refuse delivery to any one (W. U. Tel. Co. v. Foster, supra). The law does not ask itself what the parties may do, but what, in the normal course of business, it is expected that they will do. "If the normal contemplated and followed course is a transmission as continuous and rapid as science can make it from exchange to broker's office, it does not matter what are the stages, or how little they are secured by

covenant or bond" (W. U. Tel. Co. v. Foster, supra, at p. 113). The essential unity of the transaction remains the final test (Swift & Co. v. U. S., 196 U. S. 375, 399; Rearick v. Pennsylvania, 203 U. S. 507, 512).

Subjected to that test, the transactions of the petitioner's business have the unity and directness of interstate commerce. There is no break in the continuity of the transmission from pumping station in Pennsylvania to home and office and factory in Jamestown. A different question would arise if gas transmitted from Pennsylvania should be stored in reservoirs in New York, and then distributed to consumers as their needs might afterwards develop. The quantity stored or the period of storage might require us to hold that interstate commerce was at an end when the place of storage had been reached (Kehrer v. Stewart, 197 U. S. 60, 65; Brown v. Houston, 114 U. S. 622). The transactions would then be similar to those common in the oil business. We do not now determine the rule that should govern them. It is enough to hold that where there is in substance no storage, but merely transmission for immediate or practically immediate use, direct from seller to consumer, interstate commerce does not end till the gas has reached its goal. That, by the fair intendment of the petition, is the business conducted by this petitioner. It is not important that consumers do not signify in advance the precise amount that they will need. If their wants are approximately known, and the gas is transmitted not to be held, but to be used, so that any storage that results is merely casual and incidental, the transaction is to be treated as single and continuous. We must then say, in the language of Holmes, J., in W. U. Tel Co. v. Foster (supra), that the transmission is "as continuous and rapid as science can make it."

(2) The question remains whether, in default of action by Congress, the attempted regulation is within the police power of the state.

The petitioner is a public service corporation. Its rates are subject to regulation by some agency of government. Congress has never occupied the field of regulation, as it has done with railroads, the telegraph and telephone lines, and even the oil companies (Act to Regulate Commerce, as amended June 29, 1906, ch. 3591, and June 18, 1910, ch. 309). Gas and water companies are expressly excepted. In such circumstances, there is no implied exclusion of the police power of the states. The exercise of that power is, indeed, subject to conditions. It must not impose upon interstate commerce burdens new and direct rather than remote and incidental (Leisy v. Hardin, supra; Minnesota Rate Cases, 230 U. S. 352, 396, 400). It must not discriminate against foreign products (Brimmer v. Rebman, 138 U. S. 78; Minn. Rate Cases, supra, at p. 401). It must not introduce diversity and conflict where there is need of uniformity and harmony (Cooley v. Board of Wardens, 12 How. [U. S.] 299, 319; Wabash, St. L. & P. R. Co. v. Ill., 118 U. S. 557; Covington & C. Bridge Co. v. Kentucky, 154 U. S. 204; Minn. Rate Cases, supra, at p. 400). But subject to those conditions, the police power of the states survives, though the transac-

tions brought within its grip are those of interstate commerce. Matters peculiarly of local concern are not "left to the unrestrained will of individuals because Congress has not acted" (Minn. Rate Cases, supra, at p. 402). "Our system of government is a practical adjustment by which the national authority as conferred by the Constitution is maintained in its full scope without unnecessary loss of local efficiency" (Minn. Rate Cases, supra). No general formula can tell us in advance where the line is to be drawn. "We have no second Laplace, and we never shall have, with his Méchanique Politique, able to define and describe the orbit of each sphere in our political system with such exact mathematical precision" (Daniel Webster in Bank of Augusta v. Earle, 13 Pet. 519, 559, quoted by Henderson, "The Position of Foreign Corporations in American Constitutional Law," p. 117).

We think the line must be drawn here so as to bring the attempted regulation within the power of the state. It is important to
102 keep before us just what the state has tried to do. The rule is stated in section 65 of the Public Service Commissions Law: "Every gas corporation, every electrical corporation and every municipality shall furnish and provide such service, instrumentalities and facilities as shall be safe and adequate and in all respects just and reasonable. All charges made or demanded by any such gas corporation, electrical corporation or municipality for gas, electricity or any service rendered or to be rendered, shall be just and reasonable and not more than allowed by law or by order of the commission having jurisdiction. Every unjust or unreasonable charge made or demanded for gas, electricity or any such service, or in connection therewith, or in excess of that allowed by law or by the order of the commission is prohibited."

This gas company occupies the streets of Jamestown with its mains. Even without any statute, it would be under a duty to furnish gas to the public at fair and reasonable rates. The statute might be repealed, and still the courts would have the power, if exorbitant charges were made, to give relief to the consumer (1 Wyman, Public Service Corporations, secs. 111, 113; Gibbs v. Baltimore Gas Co., 130 U. S. 396, 408; Armour Packing Co. v. Edison El. Ill. Co., 115 App. Div. 51; Shepard v. Milwaukee Gas Co., 6 Wis. 539). The state in the adoption of this law has not imposed a new burden. It has not created a new duty. It has given a new "sanction" to "an inherent duty" (W. U. Tel. Co. v. Commercial Milling Co., 218 U. S. 406, 416). It has established a new administrative agency the better to ascertain and declare and enforce a duty already existing. We cannot doubt that the creation of such an agency is within the power of the state until Congress shall manifest the purpose to override its action
(W. U. Tel. Co. v. Comcl. Milling Co., supra; Mo., K. & T.
103 Ry. Co. v. Harris, 234 U. S. 412; Southern Ry. Co. v. Reid, 222 U. S. 424, 437; Missouri Pac. Ry. Co. v. Larrabee Flour Mills Co., 211 U. S. 612, 623; Texas & P. Ry. Co. v. Abilene Cotton Oil Co., 204 U. S. 426; Lake Shore & M. S. Ry Co. v. Ohio, 173 U. S. 285; N. Y. & N. H. R. R. Co. v. N. Y., 165 U. S. 628; Chicago, R. I. & P. Ry. Co. v. Arkansas, 219 U. S. 453; Int. & Gt. No. Ry. Co. v.

Anderson County, 246 U. S. 424). Nothinig to the contrary was held in W. U. Tel. Co. v. Foster (supra). There is a twofold distinction. The regulation there condemned was one that affected telegraph companies in a field already occupied by the statutes of the nation (Act to Regulate Commerce, as amended June 18, 1910), and it imposed a new duty instead of enforcing an old one (247 U. S. at p. 114).

In thus holding, we do not forget that the state, in the exercise of its police power, must not introduce diversity and conflict in spheres where there is need of uniformity and harmony. That is the reason why, irrespective of any occupation of the field by Congress, it may not fix the rates of interstate transportation. It may not do this, even though it confines its action to that part of the interstate journey within its own limits. The law in that respect has been undoubted since the decision in Wabash, St. L. & P. R. Co. v. Ill. (118 U. S. 557). A statute of Illinois prescribed that there should be no greater charge for a short haul than for a long one. In condemning the statute, the court emphasized the need of uniform regulation. If each state prescribed different rates for different portions of the trip, the result would be chaos. Again in the Covington Bridge case (Covington & Cinn. Bridge Co. v. Kentucky, 154 U. S. 204), the decision had a like basis. A bridge lay between two states. One state attempted to fix a charge. The court said that if one state could fix one charge, the other could fix another; and again the result would be chaos. On the other hand, the question was left open whether the two states, in default of action by Congress, might estab-
104 lish a joint tariff (154 U. S. at p. 222). These cases are taken as typical of many others. The principle back of them has been often stated. "As to those subjects which require a general system or uniformity of regulation the power of Congress is exclusive" (Minn. Rate Cases, supra, at p. 399). As to "other matters, admitting of diversity of treatment according to the special requirements of local conditions," there is a reserved power in the states, subject, in its exercise, to the overriding power of the nation. "Inaction of Congress upon these subjects of a local nature or operation, unlike its inaction upon matters affecting all the states and requiring uniformity of regulation," is not a denial, but a concession of the power of the vicinage (County of Mobile v. Kimball, 102 U. S. 691, 699; Transp. Co. v. Parkersburg, 107 U. S. 691, 703). Familiar illustrations are regulations of the fees of pilots (Cooley v. Board of Wardens, 12 How. [U. S.] 299, 319), charges for the use of wharves (Transp. Co. v. Parkersburg, supra; Minn. Rate Cases, supra, at p. 405), and tolls for the use of natural waterways, which have been artificially improved (Sands v. Manistee River Imp. Co., 123 U. S. 288). Dicta may, indeed, be quoted where the court, in sustaining police regulations, has observed, as if by way of contrast, that they did not involve the regulation of rates (Chicago, M. & St. P. Ry. Co. v. Solan, 169 U. S. 133; W. U. Tel. Co. v. Coml. Milling Co., supra, p. 418). But in every case the rates in view were rates of transportation. That is a field where regulation, if there is to be any, must be uniform. A central authority must reconcile the clashing action of

localities. What is within the police power of one state is equally in such circumstances within the police power of its neighbor. One cannot freely exercise its will without affecting at the same time the like freedom of another. In the phrase of Hobbes, there is need of

"a common power to keep them in awe."

105 We deal here with a different situation. There is here no regulation of transportation (Mfrs.' Light & Heat Co. v. Ott, 215 Fed. Rep. 940, 944). There is no regulation of a duty owing equally to two states. There is regulation of a duty owing to one of them alone. The seller of most things has the right to sell at whatever price he will. This petitioner has lost that right by the acceptance of a public franchise in consideration of a public service (Gibbs v. Baltimore Gas Co., supra; New Orleans Gas Co. v. Louisiana Light Co., 115 U. S. 650; Shepard v. Milwaukee Gas Co., 6 Wis. 639). The service is due to the state from which the privilege proceeds. Until Congress shall intervene, it is, therefore, the police power of New York that controls the sale of gas to consumers in New York. There is no division of the power between New York and Pennsylvania. There is no more a division of power than when we regulate our fees for wharfage or our tolls for artificial waterways. In these matters, protection of our own inhabitants is a duty that is ours and no one else's. The power may be displaced; but until displaced, it is undivided. Here, then, is the decisive distinction between the regulation of the price of gas and that of rates of transportation. There is no room for conflict of authority, for clashing regulations. The statute has a sphere of operation that is not national, but local (Cooley v. Bd. of Port Wardens, supra). It is idle to speak of the need of uniformity of action by states of equal competence when there is only one state whose action is involved. But even within the state, diversity rather than uniformity is exacted by the conditions of the business. Rates adequate in one city are inadequate in another. The local needs are best known to local agencies of government. No central authority, acting for the nation as a whole, will readily discern them.

The case comes, then, to this: We have a sale of a single 106 commodity. We have a pre-existing duty to sell it at fair rates. We have a transaction where conflicting regulations by the states are impossible, for the public duties regulated are fulfilled in one state only. We have a statute which declares a duty that would exist without it, and establishes a new agency of government to insure obedience. The silence of Congress cannot be interpreted as a declaration that public service corporations, serving the needs of the locality, may charge anything they please (County of Mobile v. Kimball, supra; Transportation Co. v. Parkersburg, supra; Covington Bridge Case, supra, p. 222). The local regulation stands until Congress occupies the field.

The order should be affirmed, with costs.

Hiscock, Ch. J., Chase, Hogan, Pound, McLaughlin and Andrews, JJ., concur.

Order affirmed.

107 UNITED STATES OF AMERICA, *ss.*:

The President of the United States of America to the Honorable the Justices of the Supreme Court of the State of New York, Greeting:

Because in the record and proceedings, as also in the rendition of the judgment in a suit which is in the said Supreme Court before you, or some of you, the said judgment having been made and entered by the direction and upon the remittitur of the Court of Appeals of the State of New York, being the highest Court of law or equity of the said State in which a decision could be had in the said suit entitled, In the Matter of the Application of the Pennsylvania Gas Company, Appellant, for a Writ of Prohibition directed to the Public Service Commission, Second District, and Others, Respondents, wherein was drawn in question the validity of a statute of, or an authority exercised under said State, on the ground of their being repugnant to the constitution, treaties or laws of the United States, and the decision was in favor of their validity; a manifest error hath happened to the great damage of the Pennsylvania Gas Company as by its complaint appears. We being willing that error, if any hath been, should be duly corrected, and full and speedy justice done to the parties aforesaid in this behalf, do command you, if judgment be therein given, that then under your seal, distinctly and openly, you send the records and proceedings aforesaid, with all things concerning the same, to the Supreme Court of the United States, together with this writ, so that you have the same in the said Supreme Court at Washington, within 30 days from the date thereof, that the record and proceedings aforesaid being inspected, the said Supreme Court may cause further to be done therein to correct that error, what
of right, and according to the laws and customs of the United
108 States should be done.

Witness the Honorable Edward D. White, Chief Justice of the United States, the 27th day of February, in the year of our Lord one thousand nine hundred and nineteen.

[Seal United States District Court, N. Dist. of New York.]

W. S. DOOLITTLE,
Clerk of the District Court of the United States
for the Northern District of New York,
By C. W. HIGGINSON, *Deputy.*

Allowed by
FRANK H. HISCOCK,
Chief Judge of the Court of Appeals
of the State of New York.

Filed Feb. 28, 1919. — H. — M. — M.
C. K. LOUGHRAN,
County Clerk.

109 [Endorsed:] Supreme Court of the United States. In the Matter of the Application of the Pennsylvania Gas Company, Appellant, Plaintiff in Error, for a Writ of Prohibition directed to the Public Service Commission, Alfred C. Davis, et al., Respondents, Defendants in Error. Writ of Error. Filed Feb. 28, 1919, 12 H. — M. — M. C. K. Loughran, County Clerk. Fisher & Fisher, Attorneys and Counselors at Law, Jamestown, N. Y. — Appellant, Plaintiff in Error.

110 Service of the Writ of Error, dated February 27th, from the United States Supreme Court — of New York in the Matter of Pennsylvania Gas Company against Public Service Commission, et al., and receipt of a copy thereof, is hereby acknowledged and accepted this 22nd day of March, 1919.

MARVIN L. CLAPP,
LOUIS L. THRASHER,
Attorneys for Alfred C. Davis and All Other Consumers, Defendants in Error.
ERNEST CAWCROFT,
Corporation Counsel for City of Jamestown, New York, Defendant in Error.
LOUIS L. THRASHER,
Special Counsel for City of Jamestown, New York, Defendant in Error.

Service of a true copy of the Writ of Error in the above case is hereby acknowledged and accepted this 24th day of March, 1919.

LEDYARD P. HALE,
Counsel to Public Service Commission, Second District of the State of New York, Defendant in Error.

Filed Mar. 24, 1919, —H. — M. — M.
C. K. LOUGHRAN,
County Clerk.

111 In the Supreme Court of the United States.

In the Matter of the Application of PENNSYLVANIA GAS COMPANY, Plaintiff in Error, for a Writ of Prohibition, directed to the Public Service Commission, Second District, of the State of New York, and to Alfred C. Davis, the City of Jamestown and Others, Defendants in Error, in a proceeding pending before said Commission entitled: In the Matter of the Complaint of Alfred C. Davis and others, of Jamestown, New York, under Section 71 of Public Service Commission Law against Pennsylvania Gas Company, as to price of natural gas charged to private consumers, Case No. 6040.

Error to the Supreme Court of the State of New York.

Assignment of Error.

And now comes the Pennsylvania Gas Company, Petitioner and Plaintiff in Error by Fisher & Fisher and John E. Mullin, its attorneys, and in connection with its petition for a writ of error shows that, in the record and proceedings and in the rendering of the judgment and decision of the Supreme Court of the State of New York in the above entitled cause which judgment was rendered and entered upon a remittitur from, and upon the direction of, the Court of Appeals of the State of New York manifest error has intervened to the prejudice of this petitioner and plaintiff in error in this, to wit:

First. The Court erred in holding that the Public Service Commissions Law of the State of New York (Laws 1910 Chap.
112 480—Cons. Laws of N. Y., Chap. 48) conferred upon the Public Service Commission, Second District of the State of New York, power and jurisdiction to fix the interstate gas rates of the plaintiff in error and in holding that such statute, so construed, was not repugnant to the Constitution of the United States.

Second. That the appellate courts of the State of New York having found and determined on the record that the interstate gas business conducted by plaintiff in error, including the delivery and sale to consumers in New York of gas transported by plaintiff in error from Pennsylvania, was in its entirety interstate commerce, did erroneously rule and decide against the prayers of the plaintiff in error that the Public Service Commission, Second District of the State of New York, had authority under the laws of said State to fix the rates or sale price of gas so transported and sold by plaintiff in error in interstate commerce and did erroneously decide against and dismiss the contention of plaintiff in error that under §8 of Article I of the Federal Constitution the jurisdiction of the Federal Government over such interstate gas rates was exclusive and the jurisdiction asserted by the State Commission repugnant to the Federal Constitution.

Third. The Court erroneously ruled and decided against the prayers of the plaintiff in error that the fixing by the Public Service Commission of the State of New York of the rates or sale price of gas

transported and sold by plaintiff in error in interstate commerce was not a direct or undue burden or regulation of interstate commerce repugnant to and forbidden by the United States Constitution.

Fourth. The alternative writ of prohibition granted at a special term of the Supreme Court of New York State restraining the Public Service Commission, Second District of said State, from proceeding to hear and fix the interstate gas rates of plaintiff in error was
113 properly granted on the ground that, under the Federal Constitution, Congress had exclusive jurisdiction to regulate such interstate rates and commerce and the appellate courts of the State of New York erred in reversing and dismissing the writ of prohibition and in sustaining the order of said Commission requiring plaintiff in error to submit its rates for determination by such Commission.

By reason whereof, this petitioner and plaintiff in error prays that the said judgment of the Supreme Court of the State of New York, entered, as aforesaid, upon the direction and remittitur of the Court of Appeals of said State affirming the order and judgment entered upon the decision of the Appellate Division of the Supreme Court, Third Department, may be reversed and the alternative writ of prohibition restored.

Dated the 27th day of February, 1919.

JEROME B. FISHER,
MARION H. FISHER,
JOHN E. MULLEN,
Attorneys for Pennsylvania Gas Company,
Petitioner & Plaintiff in Error.

Filed Feb. 28, 1919, — H. — M. — M.
C. K. LOUGHRAN,
County Clerk.

114 [Endorsed:] Court of Appeals, State of New York. In the Matter of the Application of the Pennsylvania Gas Company, Appellant-Plaintiff in Error, for a Writ of Prohibition directed to the Public Service Commission, Alfred C. Davis, et al., Respondents-Defendants in Error. (Copy.) Assignment of Errors. Fisher & Fisher, Attorneys and Counselors at Law, Jamestown, N. Y., — Appellant-Plaintiff in Error.

Read on application for Writ of Error.
February 27th, 1919.

FRANK H. HISCOCK,
Chief Judge Court of Appeals of
the State of New York.

115 Service of the Assignments of Error in the case entitled In the Matter of the Application of Pennsylvania Gas Company for a Writ of Prohibition directed to the Public Service Commission, Second District of the State of New York, and to Alfred C

Davis, City of Jamestown and others, and receipt of a copy thereof, is hereby acknowledge- and accepted this 22nd day of March, 1919.

MARVIN L. CLAPP,
LOUIS L. THRASHER,
Attorneys for Alfred C. Davis and All Other Consumers, Defendants in Error.
ERNEST CAWCROFT,
Corporation Counsel for City of Jamestown, New York, Defendant in Error.
LOUIS L. THRASHER,
Special Counsel for City of Jamestown, New York, Defendant in Error.

Service of a true copy of the Assignments of Error in the above entitled matter, is hereby acknowledged and accepted this 24th day of March, 1919.

LEDYARD P. HALE,
Counsel to Public Service Commission, Second District of the State of New York, Defendant in Error.

Filed Mar. 24, 1919, — H. — M. — M.
C. K. LOUGHRAN,
County Clerk.

116 STATE OF NEW YORK:

Court of Appeals.

In the Matter of the Application of PENNSYLVANIA GAS COMPANY, Appellant, Plaintiff in Error, for a Writ of Prohibition, directed to the Public Service Commission, Second District of the State of New York, and Alfred C. Davis, the City of Jamestown and others, Respondents, Defendants in Error, Complainants in a proceeding pending before said commission entitled: In the Matter of the Complaint of Alfred C. Davis and others, of Jamestown, New York, under Section 71 of Public Service Commission Law, against Pennsylvania Gas Company, as to the price of natural gas charged to private consumers, Case No. 6040.

On reading of the petition of Pennsylvania Gas Company appellant, in the above entitled suit for writ of error and the assignment of errors filed therewith, and upon due consideration of the record of said cause;

It is ordered, That a writ of error be allowed from the Supreme Court of the United States to the Supreme Court of the State of New York, that being the Court which has possession of the record in the case and which pursuant to the direction and remittitur of the Court of Appeals, the highest Court of said State of New York, entered the final order and judgment complained of, as prayed for in said petition and that said writ of error and citation thereon be is-

sued, served and returned to the Supreme Court of the United States in accordance with law upon condition that the said petitioner and plaintiff in error shall prosecute said writ of error to effect
117 and, if said plaintiff in error fails to make his plea good, shall answer to the respondents, defendants in error, for all costs and damages that may be adjudged or decreed on account of said writ of error.

And the said petitioner, plaintiff in error, now presenting a bond in the sum of One Thousand Dollars with United States Fidelity & Guaranty Company, as surety, it is ordered that the same be and hereby is duly approved.

In witness whereof, I have hereunto set my hand this 27 day of February, 1919.

FRANK H. HISCOCK,
Chief Judge of the Court of Appeals of the State of New York.

118 STATE OF NEW YORK:

Court of Appeals.

In the Matter of the Application of PENNSYLVANIA GAS COMPANY, Appellant, for a Writ of Prohibition, directed to the Public Service Commission, Second District, of the State of New York, and to Alfred C. Davis, the City of Jamestown and others, Respondents, Complainants in a proceeding pending before said commission entitled: In the Matter of the Complaint of Alfred C. Davis and others, of Jamestown, New York, under Section 71, of Public Service Commission law, against Pennsylvania Gas Company, as to the price of natural gas charged to private consumers, Case No. 6040.

To the Honorable Frank H. Hiscock, Chief Judge of the Court of Appeals of the State of New York:

The petition of the Pennsylvania Gas Company respectfully shows the following facts constituting its grievance herein:

1. That on the 20th day of February, 1919, a final order and judgment was duly entered in the office of the Clerk of Ulster County, New York, in the above entitled suit or proceeding affirming the order entered in said Clerk's Office on September 30th, 1918, upon the decision of the Appellate Division of the Supreme Court, Third Department, dismissing an alternative writ of prohibition and reversing an order dated February 2, 1918, made by Justice Hasbrouck at Ulster County Special Term and entered in the Office of the Clerk of Ulster County on March 8th, 1918, which granted said alternative writ of prohibition. That the aforesaid final or-
119 der and judgment entered February 20th, 1919, was duly made by the Supreme Court of the State of New York on February 15th, 1919, upon the determination and direction of the Court of Appeals and pursuant to the remittitur of said Court dated

January 29th, 1919. That said final order and judgment awarded costs in favor of the respondents in the sum of One Hundred Forty-eight and 15/100 ($148.15) Dollars and interest, and directed the Public Service Commission, Second District, to proceed to hear and determine the original proceeding pending before it upon the complaint of consumers and to fix the interstate gas rates of your petitioner.

2. That said Court of Appeals is the highest Court of the State of New York.

3. That said alternative writ of prohibition was granted to restrain the Public Service Commission, Second District of the State of New York from conducting a hearing upon and fixing the interstate gas rates of your petitioner in a proceeding instituted upon complaint of certain consumers demanding a reduction in rates. Such writ was granted upon a petition which alleged facts showing that the petitioner's business in question, to wit: the interstate transportation and sale to consumers in New York of natural gas produced in Pennsylvania, was interstate commerce; that said Commission had asserted its authority to fix such interstate rates and by order required petitioner to satisfy the complaint or submit such rates for determination; that such Commission was without power to fix such rates or jurisdiction to require a hearing thereon; that under the Federal Constitution, Congress had exclusive jurisdiction of the subject matter.

4. That petitioner on the application for prohibition specifically alleged a federal question; that petitioner has in each of the courts which have heard the case, including said Court of Appeals, drawn in question the validity of a State Statute, to-wit: the Public Service Commission Act and of an authority exercised under said State Statute, to-wit: the action and asserted jurisdiction of said Public Service Commission on the ground of their being repugnant to the Constitution of the United States, as is disclosed by the record on appeal duly filed with the Court of Appeals and hereby referred to.

5. Your petitioner further shows that the Court of Appeals, in its determination and opinions held that the petitioner's business in question, including the delivery and sale of gas to consumers in New York, was interstate commerce. However, said Court of Appeals decided that the Federal jurisdiction of interstate gas rates was exclusive and asserted the right and power of said Public Service Commission to fix such rates, thereby rejecting the claim of petitioner upon the aforesaid constitutional question, and your petitioner shows and urges that said judgment and decision of the highest court of the State of New York and its interpretation of the said Federal Constitution were, and are, repugnant to said Constitution of the United States.

6. And your petitioner further avers that in the proceedings certain errors were committed to the prejudice of your petitioner, all of which will more fully appear from the assignment of errors, which is filed herewith.

7. Your petitioner further shows that said final judgment
121 and order was served on it on February 21st, 1919; that pending the appeal to the Court of Appeals and until notice of entry of its judgment all action and proceedings upon the original complaint before the Commission were stayed by an order of the Appellate Division; that on February 15th, 1919, the Public Service Commission served notice on petitioner that it would proceed to a hearing upon such complaint of consumers on February 28th, 1919; your petitioner further states that it desires and intends to prosecute such writ of error to the Supreme Court of the United States and to secure a determination upon such constitutional question with all diligence and dispatch and that if preference or priority of argument can be secured under the rules of said Court, that such preference will be requested.

Wherefore, your petitioner prays:

That a writ of error from the Supreme Court of the United States may issue to the Supreme Court of the State of New York, which Court has the record in the case and which Court upon the remittitur and direction of the Court of Appeals entered the final order and judgment complained of, for the correction of the errors so complained of and that a transcript of the record and proceedings and papers in this case duly authenticated by the Clerk of the Supreme Court of the State of New York may be sent to the Supreme Court of the United States as provided by Law, and that they may be allowed to bring up for review before the Supreme Court of the United States the aforesaid order and judgment of the Court of Appeals and Supreme Court of the State of New York, and that your petitioner may have such other and further relief in the premises as may be just; and your petitioners will ever pray, etc.

122 Dated this 27th day of February, 1919.

JEROME B. FISHER,
MARION H. FISHER,
JOHN E. MULLIN,
Attorneys for Pennsylvania Gas Company, Petitioner and Plaintiff in Error.

STATE OF NEW YORK,
City and County of Albany, ss:

Jerome B. Fisher, being duly sworn, deposes and says that he is an Attorney at Law in the State of New York and resides in the City of Jamestown, New York, and is a member of the firm of Fisher & Fisher, Attorneys of Record for Pennsylvania Gas Company in the above entitled proceeding.

Deponent further says that he has read the foregoing Petition and knows the contents thereof; that the facts therein are true to his own knowledge, except as to those matters therein stated to be alleged upon information and belief, and that as to those matters, he believes it to be true; that the reason why the foregoing Petition is not executed by an Officer of the petitioning company, is that no officer

authorized by Law to execute sich a Petition resides within the County of Albany or State of New York.

JEROME B. FISHER.

Subscribed and sworn to before me this 27th day of February, 1919.

[SEAL.]

WM. R. WHITFIELD,
Comr. of Deeds, Albany, N. Y.

Filed Feb. 28, 1919, — H. — M. — M.
C. K. LOUGHRAN.
County Clerk.

123 [Endorsed:] Court of Appeals, State of New York. In the Matter of the Application of the Pennsylvania Gas Company, Appellant-Plaintiff in Error, for a Writ of Prohibition directed to the Public Service Commission, Alfred C. Davis et al., Respondents-Defendants in Error. (Copy.) Petition & Order for Writ of Error. Fisher & Fisher, Attorneys and Counselors at Law, Jamestown, N. Y., — Appellant-Plaintiff in Error.

Read on application for order for writ of error.

FRANK H. HISCOCK,
Chief Judge of Court of Appeals, State of New York.

Service of the within order is admitted this 22nd day of March, 1919.

MARVIN L. CLAPP,
LOUIS L. THRASHER,
Attorneys for Alfred C. Davis and All Other Consumers.

LOUIS L. THRASHER,
Special Counsel for City of Jamestown, N. Y.

Service of the within petition and order is admitted this 24th day of March, 1919.

LEDYARD P. HALE,
Counsel to Public Service Commission,
2d District, State of New York.

124 UNITED STATES OF AMERICA, *ss:*

To the Public Service Commission, Second District, of the State of New York, the City of Jamestown, New York, Alfred C. Davis, and others, complainants in a proceeding pending before said Commission, entitled Case No. 6040, Greeting:

You are cited and admonished to be and appear at the Supreme Court of the United States, at Washington, D. C., within thirty days from the date of the service of this citation, pursuant to a writ of error filed in the Ulster County Clerk's Office of the Supreme Court

of the State of New York, wherein the Pennsylvania Gas Company is plaintiff in error to show cause, if any there be, why the order and judgment rendered against the said plaintiff in error, as in the said writ of error mentioned, should not be corrected and why speedy justice should not be done to the parties in that behalf.

Witness, the hand and seal of the Honorable Frank S. Hiscock, Chief Judge of the Court of Appeals of the State of New York, this 27th day of February, in the year of our Lord one thousand nine hundred and nineteen.

FRANK H. HISCOCK. [L. S.]
Chief Judge of the Court of Appeals of the State of New York.

Attest:

[Seal Court of Appeals, State of New York.]

R. M. BARBER,
Clerk of Court of Appeals, State of New York.

Filed Feb. 28, 1919. — H. — M. — M.
C. K. LOUGHRAN,
County Clerk.

125 [Endorsed:] Supreme Court of the United States. In the Matter of the Application of the Pennsylvania Gas Company, Appellant-Plaintiff in Error, for a Writ of Prohibition directed to the Public Service Commission, Alfred C. Davis, et al., Respondent-Defendants in Error. Citation. Filed Feb. 28, 1919, 12 H. — M. — M. C. K. Loughran, County Clerk. Fisher & Fisher, Attorneys and Counselors at Law, Jamestown, N. Y., — Appellant-Plaintiff in Error.

126 Service of the Citation issued by Honorable Frank H. Hiscock, Chief Judge of the Court of Appeals, on February 27th, 1919, in the case entitled, In the Matter of the Application of Pennsylvania Gas Company for a writ of prohibition directed to the Public Service Commission, Second District of the State of New York, and to Alfred C. Davis, City of Jamestown and others, and receipt of a copy thereof, is hereby acknowledged and accepted this 22nd day of March, 1919.

MARVIN L. CLAPP,
LOUIS L. THRASHER,
Attorneys for Alfred C. Davis and All Other Consumers, Defendants in Error.
ERNEST CAWCROFT,
Corporation Counsel for City of Jamestown, New York, Defendant in Error.
LOUIS L. THRASHER,
Special Counsel for City of Jamestown, New York, Defendant in Error.

Service of a true copy of the Citation in the above entitled matter is hereby acknowledged and accepted this 24th day of March, 1919.

LEDYARD P. HALE,
Counsel for Public Service Commission,
Second District, of the State of New York,
Defendant in Error.

Filed Mar. 24, 1919. — H. — M. — M.
C. K. LOUGHRAN,
County Clerk.

127 At a Term of the Supreme Court Held in and for the County of Ulster, at Troy, N. Y., on the 15th Day of February, 1919.

Present: Hon. Wesley O. Howard, Justice Presiding.

Supreme Court, Ulster County.

In the Matter of the Application of PENNSYLVANIA GAS COMPANY for a Writ of Prohibition, Directed to the Public Service Commission, Second District, and to Alfred C. Davis, City of Jamestown, and Others.

On reading and filing affidavit and notice of motion, on behalf of the Complainants-Respondents, returnable at this time and place and due proof of service thereof on the attorneys for the relator-appellant, Pennsylvania Gas Company and on motion of Ledyard P. Hale, Counsel to Public Service Commission, Second District, Ernest Cawcroft, Corporation Counsel, City of Jamestown and Thrasher and Clapp, attorneys for complainants, Alfred C. Davis and others, it is hereby

Ordered and adjudged, that the order, determination and judgment of the Court of Appeals rendered and entered following argument, in the Court of Appeals, on the 12th of December, 1918, unanimously affirming the order made and entered in the office of the Clerk of Ulster County on the 30th day of September, 1918, upon a decision of the Appellate Division of the Supreme Court, Third Department, reversing and setting aside an order dated February 2nd, 1918, and entered in the office of the Clerk of the County of Ulster, on the 8th day of March, 1918, directing that an alternative writ of prohibition issue out of and under the seal of the Supreme Court directed to the Public Service Commission, Second District, and others, be and the same hereby is in all things adopted as and

128 for the order, judgment and determination of this court. And the said order and judgment so entered reversing the said order directing the issuance of an alternative writ of prohibition, be and the same hereby is in all things affirmed. And it is further

Ordered and adjudged, that the Public Service Commission, Second District, be and it hereby is authorized, empowered and directed

to proceed in a proceeding heretofore instituted before it by the complainants, Alfred C. Davis and others, in the same manner as if such alternative writ of prohibition had not been issued. And it is further

Ordered and adjudged, that the Public Service Commission, Second District, City of Jamestown and Alfred C. Davis, Samuel A. Carlson, Cheston A. Price, Merlin A. Bliss, Alexander K. Nair, C. A. Call, William H. Anderson, Smith Ackroyd, E. W. Henning, Joseph M. Theolander, George W. Jude, C. W. Herrick, O. N. Rushworth, John B. Sherman, Fred R. Hemphill, F. W. Gurney, L. A. McCullough, Charles E. Lindstrom, John A. Anderson, F. A. Nelson, C. A. Fleming, W. W. Trumbull, John M. Thomas, L. M. Drake, L. F. Leonhart, P. W. Engstrom, A. J. Lendberg, C. M. Johnson, Frank E. Conley, J. W. Durham, Carl W. Hermanson, Edward O. Peterson, F. A. Stone, C. F. Bates, G. E. Stanley, A. C. Swezey, J. M. Sweet, P. H. Perry, Fred Pfeil, F. F. Lockwood, Algot J. E. Larson, Charles A. Anderson, C. L. Smith, Charles O. Jarl, R. G. Bullock, E. J. Card, W. H. Stone, O. W. Swanson, E. G. Sampson, J. G. Young, R. Nyberg, G. A. Anderson, O. C. Lee, F. A. Brightman, C. A. Johnson, J. F. Bauer, H. O. Londholm, Carl W. Leberg, J. R. Jones, H. A. Morgan, C. K. Hauenstein, C. G. Seagren, E. C. Bush, L. Skar, H. E. Leave, E. R. Strong, H. Martens, C. O. Peterson, J. Hegstedt, Alfred Swanson, E. E. Johnson, E. V. Fosberg, A. Burns, A. Feldhous, Axel Anderson, P. E. Peterson, Evar C. Anderberg, E. W. Bauer, Axel Win-
129 sell, Gust A. Lofgren, Bert J. Swanson, Charles Ohnstrand, B. G. Johnson, R. Peterson, J. W. Chadwick, Dan Reagan, Albin Ljungren, Leon C. Leroy, C. A. Carlson, Ernest C. Probst, Carl Olofson, Albert W. Edeborg, P. A. E. Carlson, Albert B. Walther, Edward Mulvehill, Gust Flink, C. P. Carlson, John E. Dahlin, A. Hanson, Nels Forsgren, William Sandberg, John N. Engwall, C. G. Lawson, G. Anderson, Gust Anderson, A. F. Berg, G. A. Rose, John Christofferson, J. W. Scofield, Harry Lindholm, Clark Scofield, Alfred Lund, Ernest A. Stromdahl, C. F. Johnson, C. A. Johnson, Joseph E. Wennerstrom, John Lindberg, Otto Nelson, Fritz Peterson, Gust A. Johnson, Herman Carlson, C. J. F. Engman, E. W. Anderson, A. N. Camp, C. J. Higgs, Gust Lindstrom, C. A. Peterson, Fabian Sellstrom, and John A. Westman recover of and from Pennsylvania Gas Company the sum of One hundred forty-eight dollars and fifteen cents, their costs and disbursements as taxed by the clerk and have execution therefor.

Judgment signed this 15 day of Feb., 1919.

W. O. HOWARD,
Jus. Sup. Ct.

Filed Feb. 20, 1919, — H. — M. — M.
C. K. LOUGHRAN,
County Clerk.

130 [Endorsed:] Supreme Court, Ulster County. In the Matter of the application of Pennsylvania Gas Company for a writ of Prohibition, directed to the Public Service Commission, Second District, and to Alfred C. Davis, City of Jamestown, and Others. Copy. Order and Judgment adopting determination of Court of Appeals. Thrasher & Clapp, Attorneys for Complainants, 504 Fenton Building, Jamestown, N. Y. Served by Mr. Clapp at 2:45 P. M. on 2/21/19.

SIR: Take notice, that an Order and Judgment of which the within is a true copy, was duly granted and entered in the within action, on the 15 day of February, 1919, and filed in Ulster County Clerk's Office on Feb'y 20, 1919.

Yours, etc.,

THRASHER & CLAPP,
Attorneys for Complainants, Jamestown, N. Y.

To Fisher & Fisher, Attorneys for Penna. Gas Co.

131 STATE OF NEW YORK, *ss:*

Court of Appeals.

Pleas in the Court of Appeals Held at Court of Appeals Hall, in the City of Albany, on the 28" Day of January, in the Year of Our Lord One Thousand Nine Hundred and Nineteen, before the Judges of said Court.

Witness the Hon. Frank H. Hiscock, Chief Judge, presiding.

R. M. BARBER, *Clerk.*

Remittitur Jan. 29, 1919.

In the Matter of the Application of PENNSYLVANIA GAS CO., Appellant, for a Writ of Prohibition, Directed to the Pub. Serv. Comm., 2d Dist., &c.

Be it remembered, That on the 12" day of December in the year of our Lord one thousand nine hundred and eighteen Pennsylvania Gas Company the appellant in this cause, came here into the Court of Appeals, by Fisher & Fisher its attorneys, and filed in the said Court a Notice of Appeal and return thereto from the order and judgment of the Appellate Division of the Supreme Court in and for the Third Judicial Department. And Public Service Commission Second District & ors., the respondents in said cause, afterward appeared in said Court of Appeals by Ledyard P. Hale & Ors., their attorneys.

Which said Notice of Appeal and the return thereto, filed as aforesaid, are hereunto annexed.

Whereupon, the said Court of Appeals having heard this cause argued by Mr. Marion H. Fisher of counsel for the appellant, and by

Mr. Ledyard P. Hale and Louis L. Thrasher of counsel for the re-
spondents, and after due deliberation had thereon, did orde
132 and adjudge that the order of the Appellate Division of th
Supreme Court appealed from herein be and the same hereb
is affirmed, with costs.

And it was also further ordered that the record aforesaid, and th proceedings in this Court, be remitted to the said Supreme Court there to be proceeded upon according to law.

Therefore, it is considered that the said order be affirmed, wit costs.

And hereupon, as well the Notice of Appeal and return thereto aforesaid as the judgment of the Court of Appeals aforesaid, by i given in the premises, are by the said Court of Appeals remitted int the Supreme Court of the State of New York, before the Justice thereof, according to the form of the statute in such case made an provided, to be enforced according to law, and which record now re mains in the said Supreme Court before the Justices thereof, etc.

R. M. BARBER,
Clerk of the Court of Appeals
of the State of New York.

Court of Appeals, Clerk's Office.

Albany, Jan. 29, 1919.

I hereby certify that the preceding record contains a correct transcript of the proceedings in said cause in the Court of Appeals, with the papers originally filed therein, attached thereto.

[SEAL.] R. M. BARBER, *Clerk.*

Filed Feb. 14, 1919, — H. — M. — M. C. K. Loughran, County Clerk.

133 [Endorsed:] Court of Appeals. Decision and Remittitur

134 Supreme Court of the United States.

In the Matter of the Application of PENNSYLVANIA GAS COMPANY, Appellant-Plaintiff in Error, for a Writ of Prohibition Directed to the Public Service Commission, Alfred C. Davis, et al., Respondents-Defendants in Error, etc.

The plaintiff in error, the Pennsylvania Gas Company, on the 28th day of February, 1919, filed with the undersigned Christopher K. Loughran as Clerk of the Supreme Court of the State of New York in Ulster County, New York, in the above entitled proceeding the following documents;

1st: The original bond approved by the Honorable Frank S. Hiscock, Chief Judge of the Court of Appeals on the 27th day of

February 1919, given as security for the prosecution of such writ of error in the United States Supreme Court.

2nd: The original writ of error issued by William S. Doolittle, Esq., Clerk of the United States District Court for the Northern District of the State of New York, by C. W. Higgison, Deputy, on the 27th day of February 1919, together with four copies thereof, one for each defendant in error and one for the files of my office. Also order and petition; assignment of error and citation.

In witness whereof, I have hereunto set my hand and affixed the official seal of the Supreme Court of the State of New York, at my office in the City of Kingston, New York, this 28th day of February, 1919.

C. K. LOUGHRAN,
Clerk of the Supreme Court
of *the State of New York, Ulster County.*

Filed Feb. 28, 1919, 12 M.
C. K. LOUGHRAN,
County Clerk.

135 Know all men by these presents, that the Pennsylvania Gas Company, as principal, and the United States Fidelity and Guaranty Company, as surety, are held and firmly bound unto the Public Service Commission, Second District of the State of New York, City of Jamestown, New York and Alfred C. Davis and others, defendants in error, in the sum of One Thousand Dollars, to be paid to the said Public Service Commission, Second District, City of Jamestown, New York, and Alfred C. Davis, to which payment well and truly to be made we bind ourselves jointly and severally by these presents.

Whereas, the above named plaintiffs in error, Pennsylvania Gas Company, have sued out a writ of error from the Supreme Court of the United States to the Supreme Court of the State of New York to reverse the order and judgment of said Supreme Court of the State of New York, rendered on the 15th day of February, 1919, and entered in the Office of the Clerk of Ulster County, New York, on the 20th day of February, 1919, in a suit entitled: In the Matter of the Application of Pennsylvania Gas Company for a Writ of Prohibition, Directed to the Public Service Commission, Second District, and to Alfred C. Davis, City of Jamestown, and Others.

Now, therefore, the condition of this obligation is such that if the above named plaintiff in error shall prosecute its said writ of error to effect and answer all costs and damages that may be adjudged, if it shall fail to make good its plea, then this obligation is to be void; otherwise to remain in full force and effect.

In witness whereof, the said Pennsylvania Gas Company and the United States Fidelity and Guaranty Company have caused their corporate seals to be hereunto affixed, and this instrument to be

executed by their duly authorized representatives this 25th day of February, 1919.

PENNSYLVANIA GAS COMPANY, [L. S.]
By L. L. GRAHAM, *Vice President.*

Attest:

[Corporate Seal.]

H. H. McCONNELL, *Secretary.*

136 UNITED STATES FIDELITY & [L. S.]
GUARANTY CO.,
By JOHN V. McHARG,
ERNEST L. BOOTHBY,
Attorneys in Fact.

Attest:

[Corporate Seal.]

——— ———, *Secretary.*

STATE OF NEW YORK,
County of Chautauqua, ss:

On the 24th day of February, in the year 1919, before me personally came L. L. Graham, to me known, who, being by me duly sworn did depose and say that he resided in Oil City, Pennsylvania; that he is the Vice President of the Pennsylvania Gas Company, the corporation described in, and which executed the above instrument; that he knew the seal of said corporation; that the seal affixed to said instrument was said corporate seal; that it was so affixed by order of the Board of Directors of the said corporation, and that he signed his name thereto by like order.

W. E. KING,
Notary Public.

137 STATE OF NEW YORK,
County of Albany, City of Albany, ss:

On 26th day of February, 1919, before me personally came John V. McHarg and Ernest L. Boothby, to me known, who being by me duly severally sworn, did depose and say, and each for himself, did depose and say, that he resides in the City of Albany, County of Albany, New York; that he is the Attorney-in-fact of the United States Fidelity and Guaranty Company, the corporation described in and which executed the above instrument, being a corporation created and existing under and by virtue of the Laws of the State of Maryland; and that said Company has received from the Superintendent of Insurance of the State of New York a certificate of solvency and of its sufficiency as surety or guarantor, under Chapter 182 of the Insurance Law of the State of New York as amended by Chapter 182 of the Laws of 1913, and that such certificate has not

been revoked; that he knows the seal of said corporation; that the seal affixed to said instrument is such corporate seal; that it was so affixed by order of the Board of Directors of said corporation, and that he signed his name thereto by like order.

JOHN V. McHARG.
ERNEST L. BOOTHBY.

Subscribed and sworn to before me, this 26th day of February, A. D. 1919.

[SEAL.]

WM. R. WHITFIELD,
Comr. of Deeds, Albany, N. Y.

At a meeting of the Board of Directors of the United States Fidelity and Guaranty Company, held at the office of the Company, in the City of Baltimore, State of Maryland, on the 24th day of April, A. D. 1917, at which was present a quorum of said Directors duly authorized to act in the premises, on motion it was unanimously

Resolved: That in pursuance of Section 811 of the New York Code of Civil Procedure John V. McHarg and Ernest L. Boothby are hereby constituted and appointed the true and lawful attorneys of the United States Fidelity and Guaranty Company for the Counties of Albany and Rensselaer, in the State of New York; it being the intention of this Resolution to fully authorize and empower John V. McHarg jointly with Ernest L. Boothby to sign, execute and deliver for and on behalf of this Company any and all bonds or undertakings mentioned or referred to in said Section 811 of said Code, that may be given or required in any Court or legal proceedings in said Counties or any other bonds or undertakings that may be given or required in any legal proceedings in said Counties; and also any and all stipulations, bonds and undertakings given or required in any judicial acton or proceeding over which a United States Court shall exercise jurisdiction, and to attach thereto the seal of the Company.

STATE OF MARYLAND,
City of Baltimore, ss:

I, Wm. M. Pegram, Assistant Secretary of the United States Fidelity and Guaranty Company, of Baltimore, Maryland, do hereby certify that I have compared the foregoing resolution with the original thereof, as recorded in the Minute Book of said Company, and do hereby certify that the same is a correct and true transcript thereof and of the whole of said original resolution, and that said resolution has not been revoked or rescinded.

Given under my hand and the seal of said Company at the City of Baltimore, Maryland, this 2nd day of January, A. D. 1919.

WM. M. PEGRAM,
Assistant Secretary.

STATE OF MARYLAND,
City of Baltimore, ss:

I, Joseph F. Owens, a Commissioner of Deeds for the State of Ne
York, residing in the City of Baltimore, in the State of Maryland
do certify that on the 2nd day of January, in the year of our Lor
one thousand nine hundred and nineteen before me, in the City o
Baltimore, aforesaid, personally came Wm. M. Pegram to me known
who, being by me duly sworn, did depose and say that he resides i
the City of Baltimore, that he is the Assistant Secretary of the Unite
States Fidelity and Guaranty Company, the corporation described i
and which executed the above instrument; that he knows the seal o
said corporation; that the seal affixed to said instrument is said co
porate seal; that it was so affixed by order of the Board of Director
of said corporation; and that he signed his name thereto by lik
order.

In witness whereof, I have hereunto set my hand and affixed m
official seal at the City of Baltimore, in the State aforesaid, this 2n
day of January, A. D. one thousand nine hundred and nineteen.

[Seal of Joseph F. Owens, Commissioner of Deeds for the Stat
of New York, City of Baltimore, Maryland.]

JOSEPH F. OWENS,
A Commissioner of Deeds for the State of New York, Residing in the City of Baltimore, in the State of Maryland.

138 Accounting 28.

Statement United States Fidelity and Guaranty Company, Baltimore, Md., at the Close of Business March 31, 1918.

Commenced Business August 1, 1896.

Assets.

Par value.		Market value.
$1,763,000.00	Government Bonds	$1,745,324.00
4,676,663.80	Baltimore City and other Municipal, State and County Bonds	4,492,737.94
1,952,600.00	Railroad and Equipment Bonds	1,763,032.00
235,000.00	Electric Railway Bonds	217,000.00
1,641,986.00	Public Utility and Miscellaneous Bonds	1,593,456.00
192,915.00	Bank and Trust Company Stocks	388,217.00
168,600.00	Railway Stocks	172,220.00
138,800.00	Miscellaneous Stocks	142,137.00
100,000.00	Lawyers Surety Co. Stock, represented by $150,000 New York City Bonds deposited with the Superintendent of Insurance of the State of New York, and other assets	140,000.00
$10,869,564.80	Total Bonds and Stocks—Market Values March 31st, 1918.	$10,654,153.94
	Home Office Property appraised by Insurance Department of Maryland	615,000.00
	Other Property appraised by Insurance Department of Maryland	121,899.53
	Loans secured by pledge of Collaterals	74,083.50
	Loans secured by Mortgages	24,800.00
	Cash on Hand and in Depositories	2,059,949.88
	Premiums in course of collection, not more than three months due	2,723,586.18
	Deposits with Workmen's Compensation Reinsurance Bureau	261,273.69
	Interest due and accrued	132,260.35
	Other Assets	25,953.09
		$16,692,960.16

Liabilities.

Capital Stock paid in cash		$3,000,000.00
Due for Return Premiums and Reinsurance		92,169.96
Funds held under Reinsurance Treaties		33,018.51
Reserve for Taxes and Expenses in Transit		205,000.00
Commissions accrued on uncollected premiums		529,701.25
Premium Reserve Computed in Accordance with Requirements of New York Insurance Department	$6,071,781.76	
Reserve for Claims Admitted and not Admitted, all Departments, in accordance with New York Laws	4,492,140.22	
Surplus	2,266,148.45	
		12,830,070.45
		$16,692,960.16

W. GEORGE HYNSON, *Treasurer.*

CHAS. O. SCULL,
Vice-President.

STATE OF MARYLAND,
City of Baltimore, ss:

On this 30th day of April, 1918, before me, A. D. Patrick, a Notary Public in and for the City and State aforesaid, personally appeared Chas. O. Scull and W. George Hynson, Vice-President and Treasurer, respectively, of the United States Fidelity and Guaranty Company, who, being by me severally duly sworn, did depose and say that they are such Officers of the said Company, and that the above and foregoing is a full, true and correct statement of the Assets and Liabilities of the said Company, as they appeared upon the books of the said Company on the 31st day of March, A. D. 1918.

In witness whereof, I have hereunto set my hand and official seal the day and year aforesaid.

[NOTARIAL SEAL.] A. D. PATRICK,
Notary Public.

Filed Feb. 28, 1919. — H. — M. — M.
C. K. LOUGHRAN,
County Clerk.

139 [Endorsed:] Supreme Court of the United States. In the Matter of the Application of the Pennsylvania Gas Company, Appellant, Plaintiff in Error, for a Writ of Prohibition directed to the Public Service Commission, Alfred C. Davis, et al., Respondents, Defendants in Error. Copy. Bond. Fisher & Fisher.

Attorneys and Counsellors at Law, Jamestown, N. Y., — Appellant, Plaintiff in Error.

Service of the within undertaking is this day admitted. Dated — day of March 1919.

—— ——,
—— ——,
Attorneys for Alfred C. Davis & All Other Consumers.

—— ——,
Special Counsel for City of Jamestown.

The within bond approved.
Dated February 27, 1919.

FRANK H. HISCOCK,
Chief Judge Court of Appeals of the State of New York.

140 Service of the Undertaking dated in the Ulster County Clerk's Office February 29th, 1919, on Writ of Error to the United States Supreme Court in the case Matter of Pennsylvania Gas Company against the Public Service Commission et al., a receipt of a copy thereof is hereby acknowledged and accepted this 22nd day of March, 1919.

MARVIN L. CLAPP,
LOUIS L. THRASHER,
Attorneys for Alfred C. Davis and Other Consumers, Defendants in Error.
ERNEST CAWCROFT,
Corporation Counsel for City of Jamestown, New York, Defendant in Error.
LOUIS L. THRASHER,
Special Counsel for City of Jamestown, New York, Defendant in Error.

Service of a true copy of the Undertaking in the above case is hereby acknowledged and accepted this 24th day of March, 1919.

LEDYARD P. HALE,
Counsel to Public Service Commission, Second District, State of New York, Defendant in Error.

Filed Mar. 24, 1919, — H. — M. — M.
C. K. LOUGHRAN,
County Clerk.

141 STATE OF NEW YORK:

Supreme Court, Ulster County.

In the Matter of the Application of PENNSYLVANIA GAS COMPANY for a Writ of Prohibition Directed to the Public Service Commission, Second District, and to Alfred C. Davis, City of Jamestown, and Others.

It is hereby stipulated that the papers, records and documents named and listed in the attached præcipe of the plaintiff in error shall constitute the transcript of record in the following case on the writ of error from the United States Supreme Court to the Supreme Court of the State of New York, Ulster County.

Dated March 22nd, 1919.

JEROME B. FISHER,
MARION H. FISHER,
JOHN E. MULLIN,
Attorneys for Pennsylvania Gas Company, Plaintiffs in Error.

MARVIN L. CLAPP,
LOUIS L. THRASHER,
Attorneys for Alfred C. Davis and Other Consumers, Defendants in Error.

ERNEST CAWCROFT,
Corporation Counsel for City of Jamestown, New York, Defendant in Error.

LOUIS L. THRASHER,
Special Counsel for City of Jamestown, Defendant in Error.

LEDYARD P. HALE,
Counsel to Public Service Commission, Second District, State of New York, Defendant in Error.

Filed Mar. 24, 1919. — H. — M. — M.
C. K. LOUGHRAN,
County Clerk.

142 STATE OF NEW YORK:

Supreme Court, Ulster County.

In the Matter of the Application of PENNSYLVANIA GAS COMPANY for a Writ of Prohibition Directed to the Public Service Commission, Second District, and to Alfred C. Davis, City of Jamestown, and Others.

To the clerk of the Supreme Court, Ulster County:

SIR: You are hereby directed to prepare and certify a transcript of the record in the above entitled case for the use of the Supreme

Court of the United States by including therein the following papers:

1. Writ of Error from the United States Supreme Court to the Supreme Court of Ulster County, dated February 27th, 1919.
2. Assignments of Error by Pennsylvania Gas Company with prayer for reversal.
3. Petition and Order of Chief Judge Hiscock allowing Writ of Error.
4. Citation dated February 27th, 1919.
5. Judgment entered in Ulster County Clerk's Office on February 20th, 1919, upon remittitur of the Court of Appeals.
6. Opinion of the Court of Appeals.
7. Decision and remittitur of Court of Appeals.
8. Notice of appeal to Court of Appeals (page 6 of Record of this case in Court of Appeals).
9. Order to show cause dated November 20th, 1918 (Page 8 of Record).
10. Affidavit on Order to Show Cause (Page 10 of Record).

143 11. Order of Appelate Division granting leave to appear to the Court of Appeals, November 22, 1918 (Page 14 of Record).

12. Order of Appellate Division, September 10th, 1918 setting aside Writ of Prohibition (Page 16 of Record).
13. Judgment entered on the above order dismissing Writ (Page 18 of Record).
14. Opinion of the Appellate Division (Page 22 of Record).
15. Notice of Appeal to the Appellate Division by Alfred C. Davis et al. (Page 28 of Record).
16. Notice of appeal to the Appellate Division by Public Service Commission (Page 30 of Record).
17. Notice of Motion for Writ of Prohibition (Page 31 of Record).
18. Petition for Writ of Prohibition (Page 33 of Record) together with schedules attached to Petition as follows:

Schedule A (Page 43 of Record).
" B (" 51 " ").
" C (" 53 " ").
" G (" 55 " ").
" I (" 57 " ").
" J (" 59 " ").
" K (" 61 " ").

19. Opinion of Public Service Commission (Page 63 of Record).
20. Answering affidavit of Louis L. Thrasher (Page 70 of Record).
21. Answer of Pennsylvania Gas Company (Page 71 of Record).
22. Order granting alternative Writ for Prohibition (Page 77 of Record).

144 23. Alternative Writ of Prohibition (Page 79 of Record).

24. Opinion of Justice Hasbrouck on granting Writ of Prohibition (Page 82 of Record).
25. Copy of this Præcipe filed by Plaintiff in Error.

26. Receipt of Ulster County Clerk, dated February 28, 1919, showing filing and lodging of Writ of Error, etc.

27. Also transmit with Citation, Writ of Error, Assignments of Error and Præcipe, admission of Service of these papers by the attorneys for the defendants in error.

28. Undertaking on writ of error.

JEROME B. FISHER,
MARION H. FISHER,
JOHN E. MULLIN,
Attorneys for Pennsylvania Gas Company,
Plaintiff in Error.

145 Service of the within Præcipe of the Plaintiff in Error, and receipt of a copy thereof, is hereby acknowledged and accepted this 22nd day of March, 1919.

MARVIN L. CLAPP,
LOUIS L. THRASHER,
Attorneys for Alfred C. Davis and All Other Consumers,
Defendants in Error.
ERNEST CAWCROFT,
Corporation Counsel for City of Jamestown, New York,
Defendant in Error.
LOUIS L. THRASHER,
Special Counsel for City of Jamestown,
New York, Defendant in Error.

Service of the within Præcipe of the Plaintiff in Error, and a receipt of a copy thereof, is hereby acknowledged and accepted this 24th day of March, 1919.

LEDYARD P. HALE,
Counsel to Public Service Commission, Second District, State of New York, Defendant in Error.

Filed Mar. 24, 1919. — H. — M. — M.
C. K. LOUGHRAN,
County Clerk.

146 [Endorsed:] State of New York, Supreme Court, Ulster County. In the Matter of the Application of the Pennsylvania Gas Company for a Writ of Prohibition, directed to the Public Service Commission, Second District and to Alfred C. Davis, City of Jamestown and Others. (Copy.) Præcipe. Fisher & Fisher, Attorneys and Counsellors at Law, Jamestown, N. Y., — Appellant Plaintiff in Error.

147 SUPREME COURT,
State of New York, ss:

I, Christopher K. Loughran, Clerk of the Supreme Court of the State of New York, in and for the County of Ulster, New York, do hereby certify the within and foregoing papers to be true, full and

complete copies of the record and proceedings in the case entitled, Matter of the Pennsylvania Gas Company for a writ of prohibition against Public Service Commission, Second District of the State of New York, Alfred C. Davis et al. and to include all the papers and records called for in the præcipe of the plaintiff in error and by the stipulation of the parties herein.

There is included in this transcript and certification all the papers and printed matter contained in the attached volume of the record on appeal in the aforesaid case in the Court of Appeals of the State of New York, beginning with Notice of Appeal to Court of Appeals on page 6 thereof and including opinion of Hasbrouck, J., ending at page 91 of said record, folio 441, including the entire record excepting the index, the statement—printed pages three to six—and the stipulation waiving certification printed on page 91.

The opinion of the Court of Appeals rendered in said cause, the original writ of error and the original citation are attached hereto and returned herewith.

In testimony whereof, I have hereunto set my hand and affixed the seal of said Supreme Court at the Court House in the City of Kingston, County of Ulster, State of New York, this 24th day of March, 1919.

[Seal of Ulser County, State of New York.]

C. K. LOUGHRAN,
Clerk of the Supreme Court, State of New York,
in and for the County of Ulster, New York.

[Endorsed:] In the Matter of the Application of Pennsylvania Gas Company, Appellant-Plaintiff in Error. For a Writ of Prohibition directed to the Public Service Commission, Second District of the State of New York, Alfred C. Davis, et al. Respondents-Defendants in Error. Certificate Authenticating Record. Fisher & Fisher, Attorneys and Counsellors at Law, Jamestown, N. Y., — Appellant-Plaintiff in Error.

Endorsed on cover: File No. 27,024. New York Supreme Court. Term No. 330. Pennsylvania Gas Company, plaintiff in error, vs. Public Service Commission, Second District, of the State of New York, The City of Jamestown, New York, et al. Filed March 26th, 1919. File No. 27,024.

In The

Supreme Court of the United States

October Term, 1918. No. 938.

In the Matter of PENNSYLVANIA GAS COMPANY

Plaintiff in Error

against

PUBLIC SERVICE COMMISSION, SECOND DISTRICT, STATE OF NEW YORK, ALFRED C. DAVIS, CITY OF JAMESTOWN, et al.

Defendants in Error.

MOTION TO ADVANCE CAUSE.

To the Honorable Chief Justice and Associate Justices of the Supreme Court of the United States:

Now, comes the Pennsylvania Gas Company, plaintiff in error, in the above entitled cause and moves the Court that said cause be advanced upon the docket of this Court for the reason set forth in the following

BRIEF STATEMENT OF THE MATTER INVOLVED.

Your petitioner owns certain gas fields and gas wells in the State of Pennsylvania from which fields it transports gas in interstate commerce through its own pipe lines and delivers and sells the same direct to consumers in the City of Jamestown, New York. There are no intermediary companies and all the gas delivered in New York State is produced in the State of Pennsylvania. From the same fields petitioner also serves municipalities in the State of Pennsylvania.

Your petitioner having raised the rate of gas sold in Jamestown, New York, to 35 cents the Public Service Commission, Second District, of the State of New York, upon complaint of consumers in Jamestown, asserted its jurisdiction to hear and determine the rate and required petitioner to attend a hearing thereon. Whereupon petitioner secured from the Special Term of the Supreme Court of the State of New York a writ of prohibition against further action or proceedings by the Commission. This writ was granted upon the ground that petitioner's business, including the sale and delivery of gas, was interstate commerce and that the State had no jurisdiction to fix the rates or sale price of such commodity, that power being vested exclusively in the Federal Government. From the order granting such writ of prohibition the Commission and consumers appealed and secured a reversal thereof in the Appellate Division of the Supreme Court which reversal was subsequently affirmed by the Court of Appeals of the State of New York. The Court of Appeals found the entire business in question conducted by petitioner, including the sale of gas, to be interstate commerce but asserted the right of the State to control the rates. The case is now before this Court by writ of error for determination.

Your petitioner urges that the cause be advanced upon the docket for early hearing for the reason that it involves a constitutional question as to conflicting state and federal jurisdiction and is a public question of great importance which has not been directly determined by this Court; that the issue is not controlled by the recent decision of this Court in the Kansas Gas Case since in that case there were intermediary distributing companies, not existing in the case at bar.

Your petitioner further shows, that because of shortage of gas in the Pennsylvania fields the cities served by the petitioner in the State of Pennsylvania, claiming a qualified title in gas and under the claim that the business is impressed with a public use authorizing State control thereof, are asking the Pennsylvania Commission to require that plaintiff in error

shall first adequately suply all the demands, including the emergency requirements of the Pennsylvania cities before transporting any gas to New York State. This, if accomplished, will seriously restrict and limit the gas available for the communities served by plaintiff in error in New York State and discriminate against such interstate commerce. The extent of state jurisdiction and control over petitioner's interstate business is, therefore, of great importance in the State of Pennsylvania as well as in the State of New York and in view of the conflicting interests of those states the extent of their jurisdiction should be determined at the earliest possible moment.

Your petitioner further shows that the defendants in error have contested and denied the right of plaintiff in error to a stay pending the decision by this court of the pending writ of error in spite of the fact that petitioner, in securing the writ of error, took the necessary steps to perfect a supersedeas under §1007 of the Revised Statutes; and unless this cause is advanced on the calendar for early determination by this Court, the defendant in error, the Public Service Commission, will have made a rate investigation and made and enforced an order in the premises prior to the decision by this Court of the power and jurisdiction of said Commission over the subject matter.

WHEREFORE, petitioner prays and moves the Court that this cause be advanced upon the docket for early consideration under Subd. 7, Rule 26 of this Court. May 12th, 1919.

MARION H. FISHER,
JOHN E. MULLIN,

Attorneys for Plaintiff in Error Pennsylvania Gas Company.

Likewise now comes the Defendant in error, Public Service Commission, State of New York, Second District, and prays the Court that the above entitled cause may be advanced on the docket for early argu-

ment and determination. The Public Service Commission joins in application for advancement on the ground that the question of State power and jurisdiction involved is of great public importance and moment in this State and, on information and belief in other States, and should be settled beyond controversy as soon as may be done.

LEDYARD P. HALE,

Counsel to Public Service Commission, Second District, State of New York.

The defendants in error, City of Jamestown and Alfred C. Davis, et al, complainants in the original proceedings pending before the Commission likewise pray that this cause be advanced upon the calendar of this court for determination at the earliest possible moment on the grounds that the question of state jurisdiction involved in this case is a public question of great importance affecting material interests of such defendants in error which should be decided at the earliest possible moment.

May 16th, 1919.

LOUIS L. THRASHER,

Aattorney for defendants in error, Alfred C. Davis, et al, and

Counsel for defendant in error, City of Jamestown.

FILED
NOV 15 1919
JAMES D. MAHER

IN THE

Supreme Court of the United States

OCTOBER TERM, 1919

No. 330.

PENNSYLVANIA GAS COMPANY
Plaintiff in Error

vs:

PUBLIC SERVICE COMMISSION, SECOND DISTRICT, OF THE STATE OF NEW YORK, THE CITY OF JAMESTOWN, NEW YORK, *et al.*

BRIEF FOR PLAINTIFF IN ERROR

WRIT OF ERROR TO THE SUPREME COURT
OF THE STATE OF NEW YORK

MARION H. FISHER
and
JOHN E. MULLIN
For Plaintiff in Error.

JOURNAL PRESS, JAMESTOWN, N. Y.

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1919.

No. 330.

PENNSYLVANIA GAS COMPANY, Plaintiff in Error
against
PUBLIC SERVICE COMMISSION, SECOND DISTRICT, OF THE STATE OF NEW YORK, THE CITY OF JAMESTOWN, NEW YORK, et al, Defendants in Error.

STATEMENT OF THE CASE.

This is a writ of error to the Supreme Court of the State of New York to review a judgment of that Court entered upon remittitur from the Court of Appeals dismissing a writ of prohibition against the Public Service Commission, Second District of the State of New York and sustaining an order made by that Commission requiring the plaintiff in error to reduce its interstate gas rates or to file answer and permit that Commission to fix the rates.

The complaint on which the Commission based its order and asserted its jurisdiction was filed by consumers of plaintiff in error in Jamestown, New York and demanded a reduction of gas rates (pp. 21, 23). The complaint showed on its face that the business in question was interstate commerce. It alleged:

"That the Pennsylvania Gas Company is a corporation, organized and existing under the laws of the State of Pennsylvania and engaged principally in the business of transporting and marketing natural gas. That the source of supply of such natural gas to such Pennsylvania Gas Company is wholly within the State of Pennsylvania. That said Pennsylvania Gas Company markets its natural gas product, in part at least, within the State of New York, and among other places so served, is the City of Jamestown, within which city the sole source of supply of natural gas to consumers, is furnished by the said Pennsylvania Gas Company * * *. That the source of supply of said Pennsylvania Gas Company is at or near the City of Warren, in the State of Pennsylvania and that said City of Warren is distant from said City of Jamestown approximately twenty-two miles. * * * That said Pennsylvania Gas Company supplies, besides the said City of Jamestown, consumers within the Village of Falconer and Town of Ellicott, both in said Chautauqua County, N. Y., and the cities of Warren, Corry and Erie, in the State of Pennsylvania."

Accompanying this complaint, the Public Service Commission served upon plaintiff in error the order above referred to (p. 26, 27), requiring:

"* * * That the matters complained of be satisfied by said Company or that the charges in said complaint be answered in writing within twenty days from the service upon said Company of a certified copy of this order and a copy of the complaint * * *."

To this complaint the Gas Company filed with the commission a demurrer by which it asserted that the rates in question were rates for the in-

terstate transportation and sale of natural gas; that power to regulate such rates was exclusively vested in Congress by the Federal Constitution and that the state commission had no jurisdiction over the subject matter (p. 27, 28).

The Public Service Commission over-ruled this demurrer by formal order (p. 28) and again required an answer. Plaintiff in error petitioned the commission for a rehearing on the question of jurisdiction (p. 29), which was denied (p. 31). Plaintiff in error then sought to review the determination of the Commission by a writ of certiorari, but it was held that certiorari would not issue before trial (p. 31). An answer was then filed by plaintiff in error, which repeated the allegations of the demurrer as to interstate commerce and denied any jurisdiction in the Commission (p. 37, 40). Immediately thereafter and before any hearings were held, the Gas Company secured an alternative writ of prohibition, forbidding further action by the Commission (p. 42).

The writ of prohibition was issued by the clerk of the Supreme Court of Ulster County on February 28th, 1918 (p. 43). It was granted after notice and a hearing by order of Mr. Justice Hasbrouck at Special Term (p. 41). Justice Hasbrouck wrote an opinion (p. 43) in which he held that the Federal government had exclusive jurisdiction of the subject matter.

The order granting the alternative writ directed the plaintiffs in error to show cause why the writ should not be made absolute (p. 41). No return was made by the defendants in error. They appealed directly to the Appellate Division, Third

Department of the state Supreme Court (p. 13, 14), thus conceding the facts stated in the petition. The Appellate Division, Justice Lyon writing the opinion of the Court (p. 10) reversed the order of Special Term and upon such decision an order (p. 6) and a judgment (p. 7) were entered in the Supreme Court of Ulster County dismissing the writ.

However, the Appellate Division, in its opinion written by Mr. Justice Lyon (p. 10) admitted its doubt as to the correctness of its decision (see p. 13) and after argument on a show cause order (p. 2) granted plaintiff in error a stay and leave to appeal to the Court of Appeals (p. 5), certifying the following question, (p. 6):

> "Upon the facts stated in the record herein, has the Public Service Commission, Second District, of the State of New York, power or jurisdiction over the rates of the Pennsylvania Gas Company for natural gas produced by said Company in the State of Pennsylvania and sold by it directly to consumers in the City of Jamestown, Chautauqua County, State of New York?"

Plaintiff in error thereupon appealed to the Court of Appeals upon the certified question and as a matter of right upon the whole record (p. 1).

The Court of Appeals affirmed the dismissal of the writ and upon its remittitur the final judgment of the Supreme Court now under review was entered February 20, 1919, in the office of the clerk of the County of Ulster (p. 65). The opinion of the Court of Appeals was written by Judge Cardoza (p. 49).

The plaintiff in error then petitioned the Chief Judge of the Court of Appeals of New York for a writ of error on the ground that the Public Service Commission's Law and the authority asserted under it by the state commission of power to regulate interstate gas rates were repugnant to the Federal Constitution (see pp. 60, 61).

Chief Judge Hiscock allowed the writ of error by order dated February 27, 1919 (p. 59). The writ was duly issued (p. 55), and with the citations (p. 63), assignments of error (p. 57) and undertaking (p. 69), was duly served and filed in the office of the clerk of Ulster County, New York.

THE FACTS.

The facts recited in the petition upon which the Writ of Prohibition was granted are undisputed. No issue of fact was raised by defendant in error by filing a return, or otherwise. The petition (p. 16-21) after setting forth that plaintiff in error is a Pennsylvania corporation with its principal office at Warren, Pennsylvania, recites:

> "That the only business conducted by petitioner within the State of New York is the transportation and sale of natural gas to consumers in the City of Jamestown and the adjoining Village of Falconer and Town of Ellicott within said state; that petitioner produces no gas within the State of New York, nor does it purchase or use any gas produced in said State; that all the gas sold by petitioner to consumers within the State of New York is produced or purchased by petitioners within the State of Pennsylvania and transported by peti-

tioner across the State line to the aforesaid consumers; that the petitioner delivers its gas direct to its consumers in the State of New York; that in the distribution and sale of such gas in the aforesaid communities the petitioner operates under certain local franchises, which franchises contain no price or rate limitation; that the principal gas fields aforesaid, from which the petitioner secures its gas, are located approximately fifty miles from said City of Jamestown. The petitioner further states that less than 5% of the gross value of petitioner's entire property is located within the State of New York; that all petitioner's gas lands and gas fields and leases and a large percentage of its transportation mains, pumping stations and other property constituting 95% in value of petitioner's total property is located in the State of Pennsylvania beyond the territorial jurisdiction of the Public Service Commission, Second District. That the petitioner's property in the State of New York consists almost entirely of local mains, distributing lines, service pipes and meters. * * *

"That defendant (petitioner) supplies beside the City of Jamestown, consumers within the Village of Falconer and the Town of Ellicott, both within said Chautauqua County, New York, and the cities of Warren, Corry and Erie in the State of Pennsylvania. * * *"

The petition further recites the filing of the complaint against said rates and the proceedings had before the Public Service Commission already outlined under the statement of the case in this brief (supra p. 2); and asserts (p. 19):

* * * "That the jurisdiction and powers vested in the Public Service Commission, Second District, are limited and that said Com-

mission has no right or power to fix the rates at which petitioner shall sell its gas to consumers within the State of New York; that the transportation to and sale of such gas by petitioner in the State of New York is interstate commerce. That the Commission has no jurisdiction over the question of rate or sale price thereof and no power to compel or require an investigation or hearing thereon and that jurisdiction over such subject is vested exclusively in the Federal Government under the Federal Constitution. * * *"

The petition further shows that unless a writ of Prohibition were granted against the Public Service Commission the petitioner would illegally be put to great cost and expense in preparing for and attending a hearing on its rates before a tribunal without jurisdiction over them (p. 20).

The petition shows good faith and that no other adequate remedy was available.

There is no storage of the gas within the state of New York or elsewhere. The transportation is continuous and direct from the wells to the consumers. (see Court of Appeals opinion, p. 51).

Opinions In the Courts Below.

The opinion of Justice Hasbrouck, granting the writ of prohibition is printed at page 43 of record and is published in volume 103 Misc. (N. Y.) page 37.

The opinion of the Appellate Division on the writ of prohibition is printed at page 10 of the

record and is published in volume 184 App. Div. 556.

The opinion of the Court of Appeals is printed at page 49 of record and is published in volume 225 N. Y. 398.

The opinion of the Public Service Commission is found at page 33 of the record. It is published in volume VI P.S.C. Rep. 2nd Dist. page 258.

ISSUE.

Has the State of New York power to fix the rates chargeable by a Pennsylvania public service corporation for gas which it transports from Pennsylvania and sells directly to consumers in the State of New York, there being no stoppage or storage in transit, and no co-mingling of the Pennsylvania gas with other gas or property in New York State, the entire transaction being admittedly interstate commerce?

This is the sole issue in the case. The assignments of error amplify it, but are all directed to the same fundamental question.

ASSIGNMENTS OF ERROR.

The assignments of error are as follows, (p. 57-58):

> "FIRST:—The Court erred in holding that the Public Service Commissions Law of the State of New York (Laws 1910, Chap. 480—Cons. Laws of N. Y., Chap. 48) conferred upon the Public Service Commission, Second District of the State of New York, power and

jurisdiction to fix the interstate gas rates of the plaintiff in error and in holding that such statute, so construed, was not repugnant to the Constitution of the United States.

"SECOND:—That the Appellate Courts of the State of New York having found and determined on the record that the interstate gas business conducted by plaintiff in error, including the delivery and sale to consumers in New York of gas transported by plaintiff in error from Pennsylvania was in its entirety interstate commerce, did erroneously rule and decide against the prayers of the plaintiff in error that the Public Service Commission, Second District of the State of New York, had authority under the laws of said State to fix the rates or sale price of gas so transported and sold by plaintiff in error in interstate commerce and did erroneously decide against and dismiss the contention of plaintiff in error that under § 8 of Article 1 of the Federal Constitution, the jurisdiction of the Federal Government over such interstate gas rates was exclusive and the jurisdiction asserted by the State Commission repugnant to the Federal Constitution.

"THIRD:—The Court erroneously ruled and decided against the prayers of the plaintiff in error that the fixing by the Public Service Commission of the State of New York of the rates or sale price of gas transported and sold by plaintiff in error in interstate commerce was not a direct or undue burden or regulation of interstate commerce repugnant to and forbidden by the United States Constitution.

"FOURTH:—The alternative writ of prohibition granted at a special term of the Supreme Court of New York State restraining the Public Service Commission, Second Dis-

trict of said State, from proceeding to hear and fix the interstate gas rates of plaintiff in error was properly granted on the ground that, under the Federal Constitution, Congress had exclusive jurisdiction to regulate such interstate rates and commerce and the Appellate Courts of the State of New York erred in reversing and dismissing the writ of prohibition and in sustaining the order of said Commission requiring plaintiff in error to submit its rates for determination by such Commission."

State Statute in Question

In **"Appendix A"** at the back of this brief, we print in full the relevant provisions of the New York Public Service Commission Law.

POINTS.

The Points of the plaintiff in error are as follows:

Point I.

The rates of plaintiff in error, which the State of New York has asserted its power to regulate, are rates for the transportation and sale of goods in interstate commerce.

Point II.

The State Commission has no power to regulate the rates in question, for such action necessarily imposes a direct burden and restraint upon Interstate Commerce and is prohibited by the Fderal Constitution.

Point III.

Federal functions may not be usurped under the police power, nor does the occupancy of highways by the plaintiff in error under local

franchises authorize the state to regulate the price of gas moving in interstate commerce.

Point IV.

The interstate natural gas business conducted by the plaintiff in error is national, not local, in character, and the proposed state regulation thereof is not local in its operation. Therefore, the state does not have the power of regulation.

Point V.

The power of a state to enforce common law duties, or like statutory duties, of public utilities engaged in interstate commerce does not extend to prescribing rates for interstate commerce.

ARGUMENT.

POINT I.

The rates of plaintiff in error, which the State of New York has asserted its power to regulate, are rates for the transportation and sale of goods moving in interstate commerce.

We have already described the interstate business conducted by plaintiff in error under the heading "Facts" (supra p. 5).

On this point the state courts necessarily followed the decisions of the Federal Courts, holding that natural gas is a legitimate article of commerce and that the transportation thereof by pipe line from one state for sale in another is interstate commerce.

West vs. Kansas Natural Gas Co., 221 U. S. 229.

Kansas Natural Gas Co. vs. Haskell, 172 Fed. 545.

Haskell vs. Kansas Natural Gas Co., 224 U. S. 217.

Haskell vs. Cowham, 187 Fed., 403.

Landon as Receiver vs. Public Utilities Commission, 242 Fed., 682.

At the outset we should point out the distinction between the case at bar and the Landon case recently decided by this Court. (Public Utilities Com. vs. Landon, 249 U. S. 236).

At bar the entire transaction from the wells in Pennsylvania to the burner tips in New York is conducted by one company. The plaintiff in error produces or purchases all its gas in Pennsylvania and transports, sells and delivers such gas direct to its own consumers in New York. There is no local distributing company, no intermediary between the producer and the consumer. There is no storage of gas in transit, the transaction is continuous and direct from the fields to the consumers.

The Court of Appeals held that the sales of gas by plaintiff in error to its consumers in New York was interstate commerce, saying on this point (p. 50, 51):

> * * * "We think the petitioner's business is interstate commerce * * *. The essential unity of the transaction remains the final test. * * * Subjected to that test, the transactions of the petitioner's business have the unity and directness of interstate commerce. There is no break in the continu-

ity of the transmission from pumping station in Pennsylvania to home and office and factory in Jamestown. * * * It is enough to hold that where there is in substance no storage, but merely transmission for immediate or practically immediate use, direct from seller to consumer, interstate commerce does not end till the gas has reached its goal. That, by the fair intendment of the petition, is the business conducted by this petitioner. It is not important that consumers do not signify in advance the precise amount that they will need. If their wants are approximately known, and the gas is transmitted not to be held, but to be used, so that any storage that results is merely casual and incidental, the transaction is to be treated as single and continuous. We must then say, in the language of Holmes, Jr., in W. U. Tel. Co. vs. Foster (supra) 'that the transmission is as continuous and rapid as science can make it.'"

The "original package" doctrine cannot be applied to the natural gas business.

In the lower Courts, Counsel for the consumers suggested that the "package" rule should be applied to bulk shipments of gas and that under that rule, the local sales of gas could be separated from the interstate transmission and regulated by the state. This contention was carefully considered by the Appellate Division, but after receiving supplemental briefs on the point, that Court rejected it. The contention was likewise rejected by the Public Service Commission, by Judge Hasbrouck in granting the writ of prohibition and by the Court of Appeals, which said on this point (p. 50):

* * * "The test to be applied will vary with the method of transportation and the

> subject of the sale. * * * But the rule of the 'original package' is not an ultimate principle. It is an illustration of a principle. It assumes transmission in packages, and then supplies a test of the unity of the transaction. If other forms of transmission are employed, there is need of other tests."

A little thought must make it clear that the "package" doctrine can have no application to gas. Natural gas is not put up in packages. Dealers in it cannot be deprived of the protection of the constitution merely because of that fact. There is no more reason for trying to apply the original package doctrine to the transportation and sale of gas than there was to apply it to the transmission and sale of news by telegraph service. Dealers in natural gas have no means of transporting it except by pipe line. If they have normal business dealings with persons in another state to whom, severally, they ship gas, they cannot be expected to lay separate pipe lines to each consumer or purchaser. Nor is it possible to send to one consumer a particular amount of gas thru the lines and when that is taken out send another amount to another consumer, and so on to the hundreds of thousands of consumers a company may have. The fact is the gas company conducts its business in the only way in which it can be done. It has dealings, amounting to a contract or a standing order, for such amount of gas as each consumer may ordinarily require. It is impossible for a consumer to say exactly how much gas he will want from time to time. It may depend on the weather, or on such a trivial thing as what is cooked for dinner. Nevertheless his gas-using equipment is fixed and known and his requirements are thus as definitely

known as the character of the business will permit, and are provided for. The gas company undertakes to deliver to each consumer gas in accordance with his requirements. *The essential thing is that when the gas starts from Pennsylvania on its interstate trip, it is intended for the company's various consumers in New York, in fulfillment of such prior arrangements, and is used for no other purpose.* Until delivered to the consumer, the gas is still being transported in the company's mains—*still directly in the interstate transaction.* The facts at bar present a much stronger case for the protection of the commerce clause than those to which the protection of the original package doctrine is commonly given. The gas company cannot be deprived of this protection merely because its business cannot be tested by some particular phrase originally used by the court in applying the constitution to the facts before it at a time when the natural gas business was not even dreamed of. To give to such phrases the binding force of inflexible law is to nullify the boasted flexibility of the federal constitution. As this Court said in Re Debs (158 U. S. 564 at 590):

> "Constitutional provisions do not change, but their operation extends to new matters as the modes of business and the habits of life of the people vary with each succeeding generation. The law of the common carrier is the same today as when transportation on land was by coach and wagon, and on water by canal boat and sailing vessel, yet in its actual operation it touches and regulates transportation by modes then unknown, the railroad train and the steamship. Just so it is with the grant to the national government of power over interstate commerce. But it operates today upon modes of interstate commerce

unknown to the fathers, and it will operate with equal force upon any new modes of such commerce which the future may develop."

See also:

1 Watson on the Constitution, pages 496-497.

2 Willoughby on the Constitution, secs 300-301, pages 644, 650.

The breaking of an original package of an interstate shipment before the delivery of the article therein to the persons for whom they were ultimately intended when shipped, the delivery of some of the articles from the broken package to persons for whom they were intended when shipped, the further transportation within the state of remaining articles from the broken package and the delivery of them to various persons for whom they were intended when shipped, do not deprive the entire transaction of its character as interstate commerce or subject any part of it to state law.

Western Oil Ref. Co. v. Lipscomb, 244 U. S. 346.

See also:

Caldwell v. North Carolina, 187 U. S. 622.

Rearick v. Pennsylvania, 203 U. S. 507.

Swift & Co. vs. United States, 196 U. S. 398.

Dozier vs. Alabama, 218 U. S. 124.

Crenshaw vs. Arkansas, 227 U. S. 389.

Stewart vs. Michigan, 232 U. S. 665.

United States vs. Illinois Central Railroad Co., 230 Fed. 940.

Western Union Tel. Co. vs. Foster, 247 U. S. 105.

The Court of Appeals properly accepted the recent decision of this court in the Foster Case (supra) as conclusively establishing the interstate character of the business conducted by plaintiff in error and disposing of the "package" rule so far as natural gas is concerned. The Foster Case disposes of every question which can be raised in the case at bar (1) as to the form or formality of the contracts between plaintiff in error and its consumers for gas, (2) as to the breakage of bulk and distribution of gas to numerous customers and (3) precludes any attempt to separate the local distribution and sale from the interstate transaction.

All four of the state tribunals which heard this case held that the gas business in question, including the sales of the gas, was interstate commerce. No other conclusion was possible in view of the decisions of this court above cited. We do not apprehend that that conclusion will be questioned before this court.

POINT II.

The State of New York has no power to regulate the rates in question for such action necessarily imposes a direct burden and restraint upon interstate commerce and is prohibited by the Federal Constitution.

The defendant commission asserts its power to regulate the gas rates in question under the Public Service Commission's Law of the State of New York. We have printed the relevant portions of this law in "Appendix A" at the end of this brief.

The act does not expressly exclude the interstate gas business from the jurisdiction of the commission and the state courts have held that the Legislature intended to grant to the Commission jurisdiction over all gas companies doing business in the state, and that construction is final as to the intent and purpose of the act.

The statute authorizes the commission to "determine and prescribe the just and reasonable rates and charges thereafter to be in force" (§ 66, subd. 5) and disobedience of an order of the commission fixing rates is punishable by a penalty of $1000.00 a day (§ 73).

The plaintiff in error asserts that the state act in question, so far as it purports to confer jurisdiction over the sale price of gas moving in interstate commerce, is repugnant to the Federal Constitution. By subdivisions 3 and 18 of § 8 of Article 1 of the Constitution, the states delegated to Congress the power to make all laws which shall be necessary to "regulate" commerce among the states. In delegating power to make *all laws* the states stripped themselves of power to make *any laws* on the subject.

This Court at the outset, determined and has ever since held that the power to regulate interstate commerce granted by the Commerce Clause to the Federal Government is not only paramount but exclusive of any power in the States and that the inaction of Congress is an expression of its intention that such commerce shall be free from the imposition by the States of any substantial or material burden, restraint or regulation.

Gibbons vs. Ogden, 9 Wheat 1.

Brown vs. Houston, 114 U. S. 622-730.

Wabash, St. L. & Pacific vs. Illinois, 118 U. S., 557, 573.

Bowman vs. Chicago, etc., Ry. Co., 125 U. S., 498, 507.

Covington & Cincinnati Bridge Co. vs. Kentucky, 154 U. S., 204, 212.

Louisville & Nashville R. R. Co. vs. Eubank, 184 U. S., 27, 36.

Southern Pac. Co. vs Jenson, 244 U S., 205.

The exclusive nature of the Federal power has not only been asserted in cases where the State has attempted to fix interstate rates, but also to prevent interference by the State with the sale of commodities moving in interstate commerce. Attempts by the States to regulate or restrict the freedom of importation, delivery and sale of interstate commodities have repeatedly been declared repugnant to the Constitution.

Walling vs. Michigan, 116 U. S. p. 455.

Leisy vs. Hardin, 135 U. S., 100, 119, 120.

Lying vs. Michigan, 135 U. S., 161, 166.

Caldwell vs. North Carolina, 187 U. S., 622, 625, 627.

West vs. Kansas Nat. Gas Co. 221 U. S. p. 261.

Clark Distilling Co. vs. Maryland R. R. Co. 242 U. S., 311, 328, 329.

Western Union Tel. Co. vs. Foster, 247 U. S., 105.

That the action threatened by the State in this case is a "regulation" of interstate commerce within the meaning of the commerce clause cannot be denied.

The state in effect proposes to meet the plaintiff in error at the state line and to deny it freedom to import for sale a legitimate commodity of commerce except at a price to be fixed by the state. Nay more, the state apparently proposes not only to restrict the right of sale, but to compel the plaintiff in error to continue to import its Pennsylvania product for sale at the price fixed by the state. If such a regulation is not direct and substantial—if it does not restrain and burden interstate commerce, we can conceive of no action which would.

That a business is "regulated" when the return allowed on the business or the sale price of the commodity dealt in is fixed by governmental authority cannot be questioned, and such a regulation is far more substantial and burdensome than was the regulation of customers declared to be an unauthorized interference with commerce in the Ticker case (247 U.S. 105), or the inspection charge declared invalid by this Court in the Lipscomb case (244 U. S. 346). It is more direct than the state license fees upon agents selling and delivering interstate merchandise declared repugnant to the constitution in Stewart vs. Michigan (232 U.S. 665) Caldwell vs. North Carolina (187 U.S. 622) and in Rearick vs. Pennsylvania (203 U.S. 507).

The rate or price received for the transportation and supply of the natural gas is the vital part of the transaction. The money to be received is the sole

object of all such commerce. Short of flat prohibition, there is no way to strike more directly at the heart of a commercial transaction than to fix the price that is to be received in it.

It is difficult to find a case where a state has undertaken a direct regulation of the sale price of a commodity moving in interstate commerce. Such a flagrant violation of the prohibition of the commerce clause has rarely, if ever, been attempted by the states for it has always been recognized that the fundamental purpose of the commerce clause was to promote the freest interchange of goods between the various states. To secure that result this court has always declared any substantial interference or regulation by the states affecting the sale of interstate commodities to be repugnant to the commerce clause. At the outset, Judge Marshall, speaking for this court in Brown vs. Maryland (12 Wheat 419, 447) said:

> "Sale is the object of importation and is an essential ingredient of that intercourse, of which importation constitutes a part. It is as essential an ingredient, as indispensable to the existence of the entire thing, then, as importation itself."

See also:

Leisey vs. Hardin, 135 U.S. 100, 108, 119-123.

Clark Distilling Co. vs. Maryland Ry., 242 U. S. 311, 328, 329.

Lyng vs. Michigan, 135 U. S. 161, 166.

Bowman vs. Chicago Etc. Ry. Co., 125 U. S. 507.

Judson on Interstate Commerce § 17.

This court speaking of the interstate gas business in West vs. Kansas Natural Gas Co. (221 U.S. 255, 256), declared:

> "Gas, when reduced to possession, is a commodity; it belongs to the owner of the land, and, when reduced to possession, is his individual property subject to sale by him, and may be a subject of intrastate commerce and interstate commerce. (1) Natural gas is as much a commodity as iron ore, coal or petroleum or other products of the earth, and can be transported, bought and sold as other products. (2) It is not a commercial product when it is in the earth, but becomes so when brought to the surface and placed in pipes for transportation. (3) If it can be kept within the State after it has become a commercial product, so may corn, wheat, lead and iron. If laws can be enacted to prevent its transportation, 'a complete annihilation of interstate commerce might result.'"

The threatened regulation is no less repugnant to the Constitution in its effect upon, and as determining the compensation for, interstate transportation. In either aspect as was the attempt by the State of Massachusetts to change the criteria by which customers were to be determined. (Western Union Tel. Co. vs. Foster, 247, U. S. 105):

> "It is an attempt to affect in its very vitals the character of a business generically withdrawn from state control."

It is unnecessary to consider whether the proposed regulation will be reasonable or unreasonable. The validity of state action does not rest upon the discretion or good judgment of the state,

nor on the reasonableness of the regulation imposed. It depends *solely on the question of power.*

This court, in Brown vs. Maryland (12 Wheat, 419 at p. 439), replying to the arguments that abuse was not to be apprehended, said:

> "Questions of power do not depend on the degree to which it may be exercised. If it may be exercised at all, it must be exercised at the will of those in whose hands it is placed."

In Western Union Tel. Co. vs. Kansas, (216 U. S., 1 at p. 27) the court says:

> "But the disavowal by the state of any purpose to burden interstate commerce cannot conclude the question as to the fact of such a burden being imposed, or as to the unconstitutionality of the statute, as shown by its necessary operation upon interstate commerce."

See also Railroad Commission vs. Worthington, 225 U. S. 101 at page 107 and cases there cited.

The principles announced in the above cases are fixed and settled. They have repeatedly been affirmed by this court as governing all phases of interstate commerce. The state courts have advanced two main grounds to distinguish this case from the general rule, and have suggested several theories of minor importance. The defendants in error have raised no point, except the "package" rule, which is not discussed in the opinions below, and we apprehend that in discussing the claims there advanced we will meet every argument which can be made before this court.

Theories On Which the State Claims Jurisdiction.

As above stated, the state tribunals have unanimously conceded that the business in question, including the sale of the gas, is interstate commerce. They have likewise conceded the general right to the unrestricted sale of interstate commodities. Nor has it been seriously denied that the threatened action is a "regulation" of commerce. The Court of Appeals frankly states that it is a regulation. It says "The rates are subject to *regulation* by some agency of government" (p. 51) and "that the line must be drawn here so as to bring the attempted *regulation* within the power of the state" (p. 52).

The grounds on which the state seeks to justify the jurisdiction asserted may fairly be re-arranged and analyzed for convenience of discussion as follows:

(1) That under the police power the state may regulate the rates of a public service corporation occupying highways under franchises. (Court of Appeals p. 52) It is answered under Point III. of this Brief.

(2) That natural gas is a local product; that the interstate gas business is not national in character or subject to national regulation, and hence admits local regulation of rates. This theory was advanced by the Public Service Commission (p. 35) and was the sole basis of the opinion of the Appellate Division (p. 12). It is answered under Point IV. of this Brief.

(3) That the proposed regulation is local in its sphere of operation and hence creates no conflict

between the states. This the Court of Appeals says is the decisive distinction. (p. 54) It is answered under Points IV. and V. of this Brief.

(4) That state regulation is justified to enforce the common law obligation to furnish service at reasonable rates; that the exclusive power of Congress is limited to interstate transportation rates and that state regulation of the rates in question does not regulate interstate transportation. (Court of Appeals opinion p. 53-54). These Arguments are answered under Point V. of this Brief.

POINT III.

Federal functions may not be usurped under the police power, nor does the occupancy of highways by the plaintiff in error under local franchises authorize the state to regulate the price of gas moving in interstate commerce.

Having settled the facts in favor of the contention of plaintiff in error, the Court of Appeals proceeds to determine "whether in default of action by Congress the attempted regulation is within the *police power* of the state." It states that petitioner is a public service corporation and subject to regulation by some agency of government (p. 51), and it concludes that by receiving public franchises in consideration of a public service, the plaintiff in error has lost the right of freedom of sale guaranteed by the Constitution and that the state may regulate the price.

In support of this conclusion Judge Cardoza cites three cases, none of which involve interstate commerce. In the New Orleans Gas Co. case (115 U.

S. 650) the issue was the validity of an amendment to the state constitution abrogating the monopoly features of existing franchises of public service corporations. The state asserted the validity of the amendment under the police power but this court held that that power was subordinate to the federal constitution which forbade the impairment of contracts. The Baltimore Gas Co. case (130 U. S. 396) likewise involved a contract. It was held that a person who had negotiated an agreement between two gas companies for the abandonment of service by one of them in contravention of a statute of the state could not recover for such services. There was no conflict of state and federal jurisdiction, for interstate commerce was in no way involved. Nor did Shepard vs. Milwaukee Gas Co., 6 Wisc. 638, involve interstate commerce. There the issue was the right of a public service corporation to refuse service except upon the execution of a contract.

The City of Jamestown granted to plaintiff in error a permit to lay mains under the public streets. This permit contained "no price or rate limitation." (p. 16). As a matter of fact it grants no exclusive right and was granted years before the State of New York had created the Public Service Commission or any other agency to regulate gas rates.

The "*police power*," so-called and the states asserted "*reserve powers*," which amount to the same thing, have always been advanced by the states as the excuse or justification for all attempts to interfere with interstate commerce. It has been the excuse for attempted taxation, direct and indirect, license fees and so-called inspection charges, by

which the state has sought either to derive a revenue from the sale of commodities moving in interstate commerce or to restrict such commerce indirectly so that the local goods would secure a preference over goods from other states. The *police power*, based on the common law right to protect the health of its citizens, was the theory advanced by the states as justifying the prohibition or limitations upon the sale of intoxicating liquors moving in interstate commerce, which were held repugnant by this court in Leisy vs. Hardin, (135 U. S. 100, se pp. 108, 119-123) and in Lyng vs. Michigan, (135 U. S. 161-166). Not until Congress, by the Webb Kenyon Act expressly delegated control of the subject to the states, were the states permitted to enforce police regulations over this subject for the protection of the health and morals of their citizens. If the commerce clause, until the ban was removed, forbade regulations for such an object, assuredly it precludes the regulation of the price of interstate commodities, which affects merely the pocket books of the local citizens.

Again the *police power* was the ground advanced by the state to justify the interference with interstate transportation rates condemned by this court in the *Wabash* case (Wabash St. L. Pac. R. R. Co. vs. Ill., 118 U. S. 557).

The police power was defined and its limitations as affecting interstate commerce clearly pointed out in the above cases. The regulation here proposed is far beyond its province.

Substantially parallel to the pipe line of the plaintiff in error, between the city of Warren, in Pennsylvania, and the City of Jamestown, in New

York, an interurban trolley system is operated. This line is typical of many others, occupying city streets under local franchises. The state will hardly assert that it is able to regulate the interstate business or interstate rates of such trolley lines under the police power or because of the use of local franchises. The same rules and the same principles must be applied to the interstate business of the plaintiff in error.

This court has already held that the interstate gas business may not be regulated under the police power based on the use of highways.

In West vs. Kansas Natural Gas Co. (221 U. S. 229) the state attempted to justify the regulation and restraint of interstate commerce in gas under a statute which denied to certain gas companies the necessary right of eminent domain and the use of highways for the export of gas, limiting such right to intrastate transportation of gas. The position of the state is recited in the statement of the case made by this court (pp. 249, 250) as follows:

> "The provisions of the act, it is further insisted are but exercise of the police power to conserve the natural resources of the state, and as means to that end the right of eminent domain is forbidden to foreign corporations engaged in transporting gas from the state, and the use of the highways of the state confined to pipe lines operated by domestic corporations, in order that gas may be transmitted only betwen points within the state. And such exercise of power, it is contended, does not regulate interstate commerce, but only affects it indirectly."

This claim was discussed at length in the opinion (p. 260, 262), the court saying:

> "* * * At this late day it is not necessary to cite cases to show that the right to engage in interstate commerce is not the gift of a state, and that it cannot be regulated or restrained by a state, or that a state cannot exclude from its limits a corporation engaged in such commerce. To attain these unauthorized ends is the purpose of the Oklahoma statute. The state, through the statute, seeks in every way to accomplish these ends, and all the powers that a state is conceived to possess are exerted and all the limitations upon such powers are attempted to be circumvented * * *"

We quote the above to show that the basis of the state power asserted in that case is the same as is asserted in the case at bar—the control of the state highways and power to regulate corporations using them. We have already quoted under Point II the conclusion reached by this court in the West case that the asserted police power was subordinate to the right of commerce and the act above referred to repugnant to the Constitution.

If under the Commerce Clause, a state may not regulate or restrain interstate commerce by withholding a permit to cross highways, how can the use of highways under an unconditional permit afford a basis for state regulation of interstate rates. The vital point decided in the West Case is this—that the power of the state over highways cannot in any form or guise be used to restrain or regulate interstate commerce. It is immaterial whether the state thereby attempts a prohibition, a regulation, a discrimination or a burden.

In the same case before the Circuit Court under the title Kansas Natural Gas Co. vs. Haskell (172 Fed. 545) the claim that the regulation was authorized under the police power was discussed and *the limits of the police power as applied to the interstate gas business* was clearly defined in the following language:

> "It is not intended, by anything said in the course of this opinion, to either hold or intimate the state does not possess the power to supervise, control, and regulate in a reasonable manner the method of construction and manner of laying and maintainig pipe lines to be employed in the transportation of natural gas in interstate as well as intrastate commerce, for the purpose of preserving the health and promoting the safety of its citizens and safeguarding the public against accident which may result from the conduct of a business in which a highly inflammable, dangerous, and volatile product is transported. The right of reasonable inspection, supervision, and control, commensurate with the attendant danger, the state has and should exercise in its reserve police power. What we do say, and intend to be understood as saying and meaning, is this: All such regulations must be reasonably adapted and necessary to accomplish the end sought, and the result or end sought to be attained must be such as falls within the scope of the power residing in the state. It must not be employed under disguise for the purpose of prohibiting, regulating, or controlling a proper subject of interstate commerce, for the exclusive power of regulating interstate commerce resides in the congress under the commerce clause of our national constitution."

The plaintiff in error is not a common carrier, nor were the gas companies concerned in the *West*

case (supra), but conceding, for the purpose of argument, that at common law, because of the use of highways, its charges would have been subject to regulation by the sovereign, it does not follow that the state of New York now possesses that power. By the commerce clause the state clearly stripped itself of the power to make *any laws* restraining interstate commerce. It made no reservation based on the *police power*, on common law duties, or on any other ground.

Such was the conclusion of this court in the Ticker Case (Western Union Tel. Co. vs. Foster 247 U. S. 105). The Massachusetts courts in that case had justified state regulation of alleged discrimination in the selection of customers on the grounds that by accepting franchises to occupy public streets the Telegraph Company had subjected itself to regulation under the police power. This court flatly and conclusively disposed of that claim in the following language (p. 114):

> "It is suggested that the State gets the power from its power over the streets which it is necessary for the telegraph to cross. But if we assume that the plaintiffs in error under their present charters could be excluded from the streets the consequence would not follow. Acts generally lawful may become unlawful when done to accomplish an unlawful end, U. S. vs. Reading Co., 226 U. S. 324, 357, and a constitutional power cannot be used by way of condition to attain an unconstitutional result. Western Union Tel. Co. vs. Kansas, 216 U. S. 1; Pullman Co. vs. Kansas, 216 U. S. 56, Sioux Remedy Co. vs. Cope 235 U. S. 197, 203. The regulation in question is quite as great an interference as a tax of the kind that repeated decisions have held void. *It cannot be justified*

> '*under that somewhat ambiguous term of police powers.*' Western Union Tel. Co. vs. Pendleton, 122 U. S. 347, 359. Leisy vs. Hardin, 135 U. S. 100 Savage vs Jones, 225 U S. 501, 520. Western Union Tel. Co. vs. Brown 234 U. S. 542, 547."

The Ticker case is the last word of this court on the subject. If it could properly be claimed that the West case (supra) merely condemned a prohibition of the use of highways for interstate commerce, certainly no such claim can be made regarding the Ticker case for there, the court considered and defeated a *regulation* and *restriction* made under the police power after the franchises had been granted and were being enjoyed.

The case at bar is in all fundamental respects similar to the Ticker case and cannot be *distinguished* from the Ticker case on the ground that Congress had acted in that case and that the regulation there attempted was within the province of the interstate commerce commission. That fact or phase of the case was not considered by this court. The basis of the decision in the Ticker case was the fact that the business was of a character "*generically withdrawn from state control*"—*not by statute but by force of the Constitution.*

The Ticker case disposes of the contention of the state discussed under this point. We cannot conceive how it can be understood in any other light and we do not apprehend that the determination will be so soon reversed by this court.

POINT IV.

The interstate natural gas business conducted by the plaintiff in error is national, not local, in character, and the proposed state regulation thereof is not local in its operation. Therefore, the state does not have the power of regulation.

The general principles concerning state regulations affecting interstate commerce are well settled. The question to determine here is whether, *in view of the nature of the business and the peculiar facts of this case*, it is controlled by the principle which permits a state, in the absence of action by congress, to make certain regulations affecting interstate commerce, or the principle that, by reason of the affirmative force of the commerce clause, even in the absence of action by congress, a state may not make any regulation which may impede or interfere with interstate commerce. We submit that a careful consideration of the nature of the transaction involved and the consequences of the proposed regulation of the rates for this interstate commerce make it clear that the subject is one which requires national control, and that the state has no jurisdiction over it.

The Facts as to the Character of the Commerce Involved in this Case.

It is settled that the company's business is interstate commerce and that the transaction of taking the gas from the fields or pump station in Pennsylvania and transporting and supplying it to consumers in the state of New York is a unity. (p. 50, 51).

The facts as to the character of the business of the plaintiff in error involved in this case appear at page 5 supra. By far the greater part of the interstate transaction involved in this case occurs in the State of Pennsylvania.

The contention that the principle of local state control is applicable to this case has not been based on any claim that the particular natural gas business here involved is local in its nature, but upon the broad ground that the natural gas business in general is local in its nature—that "natural gas is a local product," (p. 13).

The principal facts concerning the natural gas business generally are matters of common knowledge of which the Court will take judicial notice. From Pennsylvania natural gas is transported to Elmira, Olean, Jamestown, Buffalo and other places in the state of New York, as well as to Cleveland and other places in Ohio. From West Virginia it is piped to Maryland, throughout southwestern Pennsylvania, to Cleveland, Toledo and numerous other places in Ohio, as far west as Muncie and Kokomo, in Indiana, and also to Lexington, Frankfort and Louisville, in Kentucky. The United States government maps used by the natural gas division of the Federal Fuel Administration during the recent war show numerous interstate gas pipe lines extending throughout a large part of the states named. Great interstate pipe lines transport natural gas from Oklahoma into and across the state of Kansas and into the state of Missouri. Natural gas is now being transported from Louisiana to other states, and the industry is developing there as well as in Arkansas and the great gas producing fields of Texas, but in these three states, as

well as in the gas producing fields of the northwest where there are wells of great volume, the business is in its infancy. Many of the great interstate gas pipelines of the country are hundreds of miles in length, and the amount of capital invested in the interstate natural gas business is enormous.

The following figures are taken from a bulletin on "*Natural Gas and Natural Gas Gasoline in* 1917," *issued by the Department of the Interior, United States Geological Survey*, published September 20, 1919, and the references are to the pages thereof:

Natural gas is produced in twenty-three states (page 1057). It is produced in twenty-three counties in Pennsylvania (page 1067), in sixteen counties in New York (page 1064), thirty-two counties in West Virginia (page 1071), and fifty counties in Ohio (page 1074). There were 2,431,275 domestic consumers and 18,620 industrial consumers of natural gas in the United States in 1917 (page 1059). Of these, there were in Pennsylvania 480,500 domestic consumers and 4,418 industrial consumers (page 1059); in New York, 164,308 domestic consumers and 698 industrial consumers (page 1059); and in Ohio 872,073 domestic consumers and 4,743 industrial consumers (page 1059).

In 1917, Pennsylvania produced 133,397,206,000 cubic feet of natural gas and consumed 202,259,489,000 cubic feet, leaving 68,862,292,000 cubic feet which it received thru interstate commerce. New York produced 8,371,747,000 cubic feet and consumed 22,466,848,000 cubic feet, leaving 14,095,101 cubic feet which it received thru interstate commerce. Ohio produced 68,917,231,000 cubic feet

and consumed 165,782,369,000 cubic feet, leaving 96,865,138,000 cubic feet which it received thru interstate commerce. West Virginia produced 308,617,101,000 cubic feet and consumed 115,488,192,000 cubic feet, leaving 193,128,909,000 cubic feet which it disposed of thru interstate commerce (page 1059). As these figures of production include "only that portion of the natural gas actually produced during the year specified which found commercial utilization in that year" (page 1059), it necessarily follows that the difference between the amount of production and consumption in each state, as above set forth, was transported in interstate commerce. Computed from these figures in Ohio alone, the gas imported from other states would supply 505,802 domestic consumers and 2,750 industrial consumers.

Based on the *available* heat units computed in "Natural Gas Service" (p. 9) by Samuel S. Wyer about ten thousand feet of natural gas equal one ton of anthracite coal. This means that, in practical heating usefulness, the amount of natural gas annually transported in interstate commerce from the state of West Virginia alone to other states would be equivalent to more than 19,000,000 tons of anthracite coal, a great part of it is delivered and consumed hundreds of miles from where it is produced. It is not necessary to go into details of the states in the great midcontinent field, or other gas-producing fields of the country. Enough has been mentioned.

Were it not actually being done, one would think it impossible that the rights of investors in this great national industry should be determined on

the assumption, in total disregard of the facts, that it is essentially local in its nature and the regulation of the rates local in operation (see opinion below p. 13, 35, 54).

It is an essential part of the contention in support of state authority to regulate interstate natural gas rates that such rates depend upon local conditions and requirements with which Congress or a commission created by Congress could not be familiar.

The Interstate Natural Gas Business Requires National Regulation if Regulated at All.

If the theory that local conditions and requirements where the gas is consumed should determine the price of natural gas were sound, it would necessarily follow that the local conditions or necessities at some small town in Indiana, for illustration, which receives gas from West Virginia, might determine the rate of return which a great interstate natural gas company should receive on its properties in West Virginia, its pipelines extending across half that state, clear across the state of Ohio and a good share of the distance thru the state of Indiana. Assuming, to make a parallel with the case at bar, that the company which so transported the gas delivered it directly to consumers, without the intervention of a local company, and that all the gas so supplied came from West Virginia without any storage in Indiana and without intermingling with gas from Indiana, how can it be possible that the local conditions in Indiana should control the question. Would any one invest money in the developmet of this branch of the natural gas industry if such a rule is adopted? To permit such local regulation of the interstate gas business would discour-

age interstate commerce—one of the very things the Commerce Clause was designed to prevent.

There is no more difficulty in federal control of the natural gas business than of other kinds of interstate commerce. It may be assumed that the instances in which the natural gas business is confined to a particular locality are almost always *intrastate*, and, of course, the state would have sole control over them. The fact that the conditions of the business are not exactly the same throughout all parts of the country does not affect congressional action over it. There are doubtless many local telephones, probably "farmers' lines," which are interstate; nevertheless they are now regulated under the interstate commerce act. The same is true of short railroads. The local conditions of a short interstate railroad between points in Ohio and Indiana would differ greatly from the local conditions of a road of similar length between two points in the mountainous states of Idaho and Montana. Nevertheless, both are subject to the regulation of the interstate commerce commission and no difficulty is experienced because of the difference in conditions. Persons engaged in the interstate natural gas business cannot be deprived of the protection of the commerce clause merely because natural gas is not produced in every state in the union, or the conditions of the business are not identical in the different gas fields.

An interstate transaction requires national control whenever it is of such character that one state cannot control it without in effect extending its regulations into another state, or in effect assuming jurisdiction over property in another state, or

leaving the transaction subject to conflicting regulations of different states.

Hall v. DeCuir, 95 U. S.. 485.

Glouster Ferry Co. v. Pennsylvania, 114 U. S. 196.

Wabash etc., R. R. Co. v. Illinois, 118 U.S. 557.

C. & C. Bridge Co. v. Kentucky, 154 U. S. 204.

L. & N. R. R. Co. v. Ubank, 184 U. S. 27.

Railroad Commission v. Worthington, 225 U. S. 101.

St. Clair Co. v. International S. & C. T. Co., 192 U. S. 454.

Western Union Tel. Co. v. Foster, 247 U. S. 105.

In Wabash, St. Louis & Pac. Railway Company v. Illinois (supra), decided in 1886, this court held void a statute of Illinois which prohibited a railroad corporation from charging for the transportation of passengers or freight on its road for any distance in that state the same or greater toll than it at the same time charged for the transportation, in the same direction, of any passenger or like quantity of freight of the same class over a greater distance of the same road under a penalty of $5000. The transportation involved was between points in Illinois and the city of New York. In delivering the opinion of this court, Mr. Justice Miller said:

"By the slightest attention to the matter it will be readily seen that the circumstances

> under which a bridge may be authorized across a navigable stream within the limits of a State for the use of a public highway, and the local rules which shall govern the conduct of the pilots of each of the various harbors of the coasts of the United States, depend upon principles far more limited in their application and importance than those which should regulate the transportation of persons and property across the half or the whole of the continent, over the territory of half a dozen states, through which they are carried without change of car or breaking bulk. * * *
>
> "It is impossible to see any distinction in its effect upon commerce of either class, between a statute which regulates the charges for transportation, and a statute which levies a tax for the benefit of the State upon the same transportation; and in fact the judgment of the court in the State Freight Tax Case rested upon the ground that the tax was always added to the cost of transportation, and thus was a tax in effect upon the privilege of carrying the goods through the State."

Quoting from Hall v. De Cuir, (supra,) he further said:

> "'While it purports only to control the carrier when engaged within the State, it must necessarily influence his conduct to some extent in the management of his business throughout his entire voyage. * * * It was to meet just such a case that the commercial clause in the Constitution was adopted. The River Mississippi passes through or along the borders of ten different States, and its tributaries reach many more. The commerce upon these waters is immense, and its regulation clearly a matter of national concern. If each State was at liberty to regulate the con-

duct of carriers while within its jurisdiction, the confusion likely to follow could not but be productive of great inconvenience and unnecessary hardship. Each State could provide for its own passengers and regulate the transportation of its own freight, regardless of the interests of others. Nay, more, it could prescribe rules by which the carrier must be governed within the State in respect to passengers and property brought from without. On one side of the river or its tributaries he might be required to observe one set of rules, and on the other, another. Commerce cannot flourish in the midst of such embarrassments.' * *

"It is not the railroads themselves that are regulated by this Act of the Illinois Legislature, so much as the charge for transportation; and, in language just cited, if each one of the States through whose territories these goods are transported can fix its own rules for prices, for modes of transit, for times and modes of delivery, and all the other incidents of transportation to which the word 'regulation' can be applied, it is readily seen that the embarrassments upon interstate transportation, as an element of interstate commerce, might be too oppressive to be submitted to. 'It was', in the language of the court cited above, 'to meet just such a case that the commerce clause of the Constitution was adopted.' * * *

"And it would be a very feeble and almost useless provision, but poorly adapted to secure the entire freedom of commerce among the States which was deemed essential to a more perfect union by the framers of the Constitution, if, at every stage of the transportation of goods and chattels through the country, the State within whose limits a part of this transportation must be done could impose regulations concerning the price, compensation, or

> taxation, or any other restrictive regulation interfering with and seriously embarrassing this commerce."

In Covington & Cincinnati Bridge Co. v. Kentucky (supra), decided in 1894, this court held void a law of Kentucky providing that it should be unlawful for the bridge company, which was incorporated in both Kentucky and Ohio and maintained a toll bridge from Covington to Cincinnati, to charge more than a specified rate of toll for passage over the bridge and required the company to sell tickets at the specified rates good for passage over the bridge in either direction. There was no action by congress on the subject. In delivering the opinion of this court, Mr. Justice Brown said, (p. 218, 221):

> * * * "'Congress alone', said the court (p. 204), 'therefore, can deal with such transportation; its non-action is a declaration that it shall remain free from burdens imposed by state legislation. Otherwise, there would be no protection against conflicting regulations of different states, each legislating for its own interests and products and against those of other states.' * * *
>
> "It is clear that the state of Kentucky, by the statute in question, attempts to reach out and secure for itself a right to prescribe a rate of toll applicable not only to persons crossing from Kentucky to Ohio, but from Ohio to Kentucky, a right which practically nullifies the corresponding right of Ohio to fix tolls from her own side, (page 220, L. ed. 969). * * * It may be for the interest of Kentucky to add to its own population by encouraging residents of Cincinnati to purchase homes in Covington, and to do this by fixing

> the tolls at such a rate as to induce citizens of Ohio to reside within her borders. It might be equally for the interest of Ohio to prescribe a higher rate of toll to induce her citizens to remain and fix their homes within their own state, and as persons living in one state and doing business in another would necessarily have to cross the bridge at least twice a day, the rates of toll might become a serious question to them. Congress, and Congress alone, possesses the requisite power to harmonize such differences, and to enact a uniform scale of charges which will be operative in both directions."

We submit that the foregoing cases show that the rule as to subjects which are national in their character means only that they are of such character that they might be subject to conflicting regulations of different states.

The national character of the interstate natural gas business is recognized in the following cases:

West vs. Kansas Natural Gas Co., 221 U. S. 229.

Kansas Natural Gas Co. vs. Haskell, 172 Fed. 545.

Haskell vs. Kansas Natural Gas Co., 224 U. S. 217.

Haskell vs. Cowham, 187 Fed. 403.

Landon as Receiver vs. Public Utilities Commission, 242 Fed. 682.

We have already quoted under "Point II" the statement of this court in the West case (supra p. 255, 256) in which the freedom of interstate commerce in gas was declared and in which in that re-

spect it was compared with interstate commerce in corn, wheat, lead, iron-ore and petroleum—all subjects of interstate commerce of a *national* importance and certainly not subject to state regulation of sale price. This court further indicated its approval of the opinion of "the Circuit Court of Appeals in the Eighth Circuit" in Haskell vs. Cowham (supra) where Circuit Judge Sanborn delivering the opinion of the Court said:

> "*Interstate Commerce in natural gas*, including therein its transportation among the states by pipe line, *is a subject national in its character and susceptible of regulation by uniform rules.* The silence or inaction of Congress relative to such a subject is a conclusive indication that it intends that interstate commerce therein shall be free, and any law or act of a state or of its officers which prohibits it or substantially restrains its freedom, is violative of the Constitution and void."

Judge Booth in the Landon case, (supra) at p. 688, held:

> "The conclusion reached, therefore, is that the interstate commerce in which the receiver is engaged is not of a local nature; and is not, even in the absence of action by Congress subject to burdens or regulations imposed by State action, which are substantial rather than incidental in their nature."

In conclusion he held (p. 690):

> "The Kansas statute in question 'in so far as it attempted to fix rates for the sale and delivery of natural gas by the receiver of the Kansas Natural Gas Company, to consumers in Kansas, either directly or through intermediaries, was an attempt directly and unduly to

burden and regulate interstate commerce, and, therefore, unauthorized and void.' "

While the decision of Judge Booth in the Landon case was reversed by this court, (249 U. S. 236) it was done on the ground, as we understand the case, that the interstate commerce ceased with the delivery of the gas to independent local distributing companies. We do not understand the decision of this court as in any manner holding that the interstate natural gas business is subject to regulation by the state. Had this court thought that it was, its reversal would not have been based on the narrow ground that the interstate commerce had ceased before the gas reached the point where it was affected by the local regulation.

Cases Holding Natural Gas Subject to Local Control Distinguished.

In Jamieson v. Indiana Natural Gas & Oil Co., 128 Ind. 555, the point decided was that the state had the right to determine the pressure which should be maintained in gas mains, "a reasonable police regulation * * * so far as local safety is conserved." (p. 573, 576). What the court said about the local character of the business was not pertinent and is explained by comparing its "local" nature with coal and petroleum. (see pp. 573 and 577). Moreover, that case was decided in 1891, when the natural gas business was, at least in that part of the country, comparatively in its infancy.

In Manufacturers Light & Heat Company v. Ott, 215 Fed. 940, the question at issue was the legality of a rate fixed under authority of the state of West Virginia. The gas which the company was supplying to consumers in West Virginia was produced

almost wholly in that state. (see p. 951). The amount of interstate gas was inconsequential, its presence accidental depending on pressure conditions in the mains.

In Caster v. Flannelly, 96 Kan. 372, 152 Pac. 22, the court of that state upheld the power of the commission thereof to prescribe the rates of gas companies doing an interstate business. It was held that gas transported in interstate commerce and delivered to consumers was subject to state regulation; but in that case the gas was not distributed to consumers by the company which transported it in interstate commerce. The company which transported the gas in interstate commerce delivered it to local companies, and the interstate transaction ended there. The distribution to consumers by the local companies was a separate transaction. In the case at bar no such situation exists.

In West Virginia & Maryland Gas Co. vs. Towers et al., —Md.— 106 Atl. 265, P. U. R. 1919D, 332, the courts of Maryland held that the commission of that state has power to regulate the price of gas transported in interstate commerce, the decision being based on the ground that the "original package" doctrine is applicable to the natural gas business and that the "package" was broken when the first gas was delivered to a consumer. That the ground of the decision, and therefore the decision itself, is unsound, must be clear on considering the nature of the business.

The inapplicability of the original package rule to natural gas is discussed under Point I., (page 13, supra).

General Cases Sustaining State Regulations of Interstate Commerce Distinguished.

In the long list of cases in which the state's power to make regulations affecting interstate commerce is upheld, there is not a single case, we submit, where the regulation involved was at all comparable to the proposed regulation in this case. In the cases involving pilotage, wharfage regulations, the protection of coasts, the improvement of harbors, bays and streams, the construction of dams or bridges across navigable rivers, wharfage charges and tolls for use of artificial facilities, all related to waters, improvements, facilities, etc., wholly within the state, except one or two pilotage cases which affect service on the high seas, the question was merely one between the particular state and congress. The jurisdiction of no other state was encountered. In none of them was the transaction, in the absence of action by congress, subject to the regulation, in any of its parts, of more than one authority. Such cases have little or no bearing on the case at bar. In the cases upholding quarantine regulations and state inspection laws the substantial purpose of the regulations was merely to determine that the subjects of the interstate commerce were *sound* articles thereof,—in other words, that they were legitimate subjects of interstate commerce. By such regulations, there is no possibility of one state taking advantage of the other and no chance for conflict of regulations which would embarrass the commerce. Some of the cases involve the furnishing by carriers of facilities within the state without discrimination, but their effect is limited to the one state and there is no chance for conflict of state regulations affecting any part of the

transaction regulated. Of course the cases providing for liens for attachments on the property of a carrier, requiring it to pay for property lost or for damages for death by negligence or injuries to employees, do not necessarily affect the interstate commerce beyond the borders of the state making the regulation. There is no chance for conflict of state regulations affecting any part of the transaction regulated. The kind of a headlight a locomotive should have, or the way a coach shall be heated within the borders of a particular state are comparatively trifling matters; they do not reach the interstate transaction outside the borders of the state making them and there is no possibility by any such regulation of one state taking advantage of another, or of its citizens.

In only one case has this court upheld a state regulation affecting rates charged for interstate commerce. That was Port Richmond Ferry Co. v. Board of Chosen Freeholders, 234 U. S. 317. Two ordinances came before the court in that case, one of which prescribed rates for the passage from New Jersey to New York and the other for a round trip. The former was upheld, *the latter was held invalid.* The decision as far as it upheld the rate for the outward passage was based on the essentially local nature of a ferry, which has always been recognized. The passage was across navigable waters, over which congress had jurisdiction. In delivering the opinion of the court, Mr. Justice Hughes said (p. 332, 333):

> "It is true that in the case of a given ferry between two states there might be a difference in the charge for ferriage from one side, as compared with that for ferriage from the oth-

> er. But this does not alter the aspect of the subject. The question is still one with respect to a *ferry*, which necessarily implies transportation for a short distance, almost invariably between two points only, and unrelated to other transportation. It thus presents a situation essentially local, requiring regulation according to local conditions.
>
> * * * "If the state may exercise this power, it necessarily follows that it may not, in its exercise, derogate from the similar authority of another state. *The state power can extend only to the transactions within its own territory and the ferriage from its own shore.* It follows that the fact that rates were fixed by New York did not preclude New Jersey from establishing reasonable rates with respect to the ferry establishment maintained on its side."

It is apparent that the state action was upheld only because the other state could regulate the reciprocal part of the transaction and there could thus be no conflict of regulations. The whole interstate transaction there involved was the transportation from one side of the river to the other. That transportation, *in all its parts*, was subject to the regulation of only one authority, and the case is not an authority for the contention of the defendants in error here that a state may make a regulation which affects that part of an interstate transaction which is performed within the jurisdiction of another state. Moreover, by the regulation sustained, there was no possibility of one state taking advantage of the other or of conflict of regulations.

The Wilmington Trans. Company case (236 U. S. 151) has also been frequently cited as sustaining the power of a state to make regulations affecting

interstate commerce, but interstate commerce was not involved in that case. The rate prescribed by California was for transportation from one point within the state *over the high seas* to another point within the state. Of course the state had the right to regulate a California corporation, its own creature, on the high seas, where no sovereignty had jurisdiction. It is perfectly clear from the opinion of this court in the case that if the jurisdiction of any other state had been encountered during the passage, the state regulation would have been void. The court said (p. 156):

> "There is no passage through the territory of another state; the transportation, in its entire course, *is subject to a single authority*, either that of Congress or that of the state, and the latter would yield to the exercise of the former. The sovereignty of no other jurisdiction is encountered."

The Port Richmond Ferry case goes further to sustain state authority over interstate commerce than any other case reported or cited, and inasmuch as that case does not sustain the state's power to make a regulation such as involved in this case, there is no decision of this court which does.

A limited passage from the Minnesota Rate Case (230 U. S. 235) has been urged by defendants in error as supporting their claim of local power at bar. The issue in the rate case was the incidental effect on commerce resulting from state regulation of exclusively internal traffic. Judge Hasbrouck who, in granting the writ of prohibition, wrote an able and logical opinion considered the Rate case carefully (p. 46-48). His conclusion as to its

authority at bar is terse and correct. He says (p. 48):

> "The general rule determining what character of act upon the part of the State is local, and what national is stated in the Rate Case with comprehensive accuracy. But in the whole catalogue of specifications there found there is not one which constitutes authority for the State containing the market to fix the price of the foreign commodity which has not yet been added to the general mass of the property of that State."

The learned Court of Appeals appears to have abandoned and rejected the theory that the natural gas business is essentially local in its nature, on which the Commission and the Appellate Division based their decisions, and apparently takes the position that the fixing of the plaintiff's rates is a regulation essentially local in its operation. We discuss that under the following point.

POINT V.

The power of a State to enforce common law duties, or like statutory duties, of public utilities engaged in interstate commerce does not extend to prescribing rates for interstate commerce.

Subjecting interstate rates to control by a state commission is not the same as enforcing the common law duty to serve at reasonable rates.

Even if it be conceded that a public utility, in the absence of action by congress, must furnish interstate service at reasonable rates, and that that

duty may be enforced in state courts, it does not follow that the state, through its commission, can *prescribe or make* the rates for such interstate service.

Rate making is a legislative, not a judicial, function.

> Knoxville v. Knoxville Water Co., 212 U.S. 1, at 8;

Courts do not undertake to make rates for the utility. Permitting a state, as a legislative function, to prescribe rates, is by no means the same as enforcing in the courts the duty to serve at reasonable rates. It is substituting legislative action covering the business as a whole for a judicial determination in particular cases.

"There is always an implied understanding with reference to these structures that charges shall be reasonable, and the question of reasonableness must be settled as other questions of a judicial nature are settled, by the evidence in the particular case."

C. & C. Bridge Co. v. Ky., (*supra*), at page 222.

On Statement of Court of Appeals That Service Regulated is Performed in One State Only.

A vital error of the courts of appeals is its conclusion that "We have a transaction where conflicting regulations are impossible, *for the public duties regulated are fulfilled in one state only*." (p. 54).

If it were true that the public duties regulated were fulfilled in one state only, conflicting regulations would be impossible and the state would have

the right of regulation. But the duties regulated are not fulfilled in one state only. This is clear from the finding of the court of appeals that the transportation of the gas from Pennsylvania to the state of New York and the sale and delivery of it to consumers in the state of New York constitute one entire transaction in interstate commerce. That finding is as follows (p. 50-51):

> *"We think the petitioner's business is interstate commerce,"* * * *
>
> *"The essential unity of the transaction remains the final test"* * *.
>
> *"Subjected to that test, transactions of the petitioner's business have the unity and directness of interstate commerce. There is no break in the continuity of the transmission from the pump station in Pennsylvania to home and office and factory in Jamestown."*

After holding that the transaction of the business as a whole, which includes the transportation, the delivery, and the sale of the gas to consumers, is a unit, the court below arbitrarily separates the sale from the rest of the transaction and seeks to apply the regulation to the severed part only. It is an implied admission that only in that way can state regulation be upheld. But the sale cannot be separated from the rest of the transaction. The idea that it can must result from either a failure to comprehend the nature of the business regulated or the failure to realize what the fixing of a rate for the sale of the gas must mean.

Cases Cited by Court of Appeals on This Subject Distinguished.

None of the cases cited in the opinion of the court of appeals in this case in support of the proposition that, because of the common law duty of a public utility to furnish service at reasonable rates, the state, in the absence of action by congress, may prescribe the rates chargeable by such utility for its interstate service, sustained an attempt to extend the state regulation to any property of the utility outside the state making the regulation, or involved a regulation that could possibly let one state get any advantage over another or its citizens, or that could in any manner impede the commerce between the states. Those cases are the following: Gibbs v. Baltimore Gas Company, 130 U. S. 396, in which a contract between two competing gas companies to fix and maintain rates was held void; interstate commerce was not involved: Armour Packing Company v. Edison Electric Illuminating Company, 115 App. Div. 51 (N. Y.), which held that discriminatory charges of a public utility which had been paid by a consumer might be recovered back; interstate commerce was not involved: Shepherd v. Milwaukee Gas Light Company, 6 Wis. Reports, 539, in which the plaintiff was awarded a judgment against the defendant, a public service corporation, for refusal to furnish service unless plaintiff would sign a contract; interstate commerce was not involved: Western Union Telegraph Company v. Commercial Milling Company, 218 U. S. 406, which upheld a state statute which prohibited a telegraph company from limiting its liability for negligence in delivering a message, the message having been sent to another state but in which this court said (p. 417): "It is to the law, whether part

of the common law or found in the statutes of the state, that we look *for the validity and extent of a contract between persons*,": M. K. & T. Ry. Co. v. Harris, 234 U. S. 412, which sustained a state statute allowing an attorney fee to a successful plaintiff in an action against a carrier for damages for freight lost in an interstate shipment: Southern Ry Co. v. Reid, 222 U. S. 424, which held *invalid* a state statute penalizing a carrier for refusing to receive freight for shipment to a point of the line of another carrier outside the state: Missouri Pacific Ry Co. v. Larrabee Flour Mills Co., 211 U. S. 612, which sustained a state court in compelling, by mandamus, a carrier to furnish cars without discrimination, although a large part of the commerce was interstate —three justices dissenting: Lake Shore & M. S. Ry. Co. v. Ohio, 173 U. S. 285, which upheld a state statute requiring interstate trains to make certain stops in the state,—charter requirements involved: Texas & P. Ry. Co. v. Abilene Cotton Oil Co., 204 U. S. 426, which held a shipper cannot recover unreasonable rates paid on interstate shipments when the rate paid is the regular filed rate, without action by the interstate commerce commission: N. Y. & N. H. R. R. Co. v. N. Y., 165 U. S. 628, state law forbidding heating cars with stoves upheld: Chicago, R. I. & P. Ry. Co. v. Arkansas, 219 U. S. 453, state "full crew" law upheld: Int. & Gt. No. Ry. Co. v. Anderson County, 246 U. S. 424, injunction of state court to prevent railroad company from removing machine shops, etc., which it had agreed to maintain, upheld.

Conflict of regulations of two states will result if New York is given jurisdiction over the subject matter.

The transaction here involved is this: Taking the gas from gas fields *in Pennsylvania*, transporting it forty-five miles through pipelines, aided by pump station, *within the state of Pennsylvania*, transporting it five miles through pipelines within the state of New York and supplying it to consumers in the city of Jamestown, etc., in the state of New York. It is all one transaction. Most of the service for which the rate pays is performed in Pennsylvania.

The attempt to separate the sale from the rest of the transaction is arbitrary and unwarranted. It implies that the transportation of the gas is a matter purely of the company's concern; but that is inconsistent, not only with the general theory of the rights and obligations of public utilities, but with the statute of Pennsylvania under which the company exists. That statute provides:

> "The *transportation and supply* of natural gas for public consumption *is* hereby declared to be a public use, and it shall be the duty of corporations, organized or provided for under this act, to furnish to consumers along their lines and within their respective districts natural gas for heat or light or other purposes as the corporations may determine."
>
> Act of May 29, 1885, sec. 10, P. L. 29, amended by Act of May 11, 1897, P. L. 50.

Transportation is not one thing and supply another. If the transportation were, as implied, a matter solely of the company's concern, it would

not be subject to regulation as a public service and the company *could not* be given the right of eminent domain for that purpose.

Gas is furnished to consumers in Warren, Corry, and Erie, in the State of Pennsylvania, from the same gas fields, through the same pipelines and by the aid of the same compressors, station or pump station, that supply consumers in New York, except that after passing through the pump station, the gas goes to New York and to the Pennsylvania municipalities through separate pipelines. Until the gas leaves the pump station, there is no segregation of the property or operations of the company.

What the rate must pay for:

The rate must compensate the plaintiff in error for two things: a commodity and a service. The commodity is the gas itself; the service is taking it from the gas fields of Pennsylvania, and delivering it to consumers in the state of New York. Without the service, there could be no sale.

The commission recognized in this case that transportation is a part of the service paid for. It said (p. 35):

> "In some cases, where the gas is transported a long distance, the charge for its use may be composed largely of items which arise from the cost of transportation."

The least that the plaintiff in error is entitled to receive for the transportation and supply of its gas is a rate which will produce a fair return upon the

fair and reasonable value of its property used and useful in serving the public. This is well settled.

> "The starting point of any estimate of reasonable rates must be the present value of the property employed in the public service, and the owner is deprived of his property without just compensation when the rate imposed fails to give a 'fair return' on that value."
>
> Hannis Taylor on Due Process of Law, page 414.
>
> "We hold, however, that the basis of all calculations as to the reasonableness of rates to be charged by a corporation maintaining a highway under legislative sanction must be the fair value of the property being used by it for the convenience of the public. * * * What the company is entitled to ask is a fair return upon the value of that which it employs for the public convenience."
>
> Smyth v. Ames, 169 U. S. 466, at 546-547.
>
> See also:
>
> San Diego Land Co. v. National City, 174 U. S. 739, at 755-6-7.
>
> Cotting v. Kansas City Stock Yards Co., 183 U. S. 79, at 89, 91.
>
> Lincoln G. & E. L. Co. v. Lincoln, 223 U. S. 349.
>
> Wilcox v. Consolidated Gas Co. 212 U. S. 19.
>
> Minnesota Rate Case, 230 U. S. 352, at 434, 454, 457.

As applied to the facts in this case, that would mean that the rates fixed must provide revenue

from New York consumers for the following purposes:

As to the State of New York:

(1) Pay all operating expenses, taxes, etc., within the said state;

(2) Pay an annual depreciation charge for the company's property in New York;

(3) Pay a fair return on the value of the company's property in New York used for supplying gas to consumers therein.

As to the State of Pennsylvania:

(1) Pay all operating expenses, if any, incurred in Pennsylvania exclusively in supplying gas to New York;

(2) Pay an annual depreciation charge for all property in Pennsylvania used exclusively in supplying gas to New York;

(3) Pay a fair return on the value of the company's property in Pennsylvania used exclusively in supplying gas to New York;

(4) Pay a proper proportion of all the company's expenses in Pennsylvania incurred in supplying gas to New York and consumers in Pennsylvania, as well as a proper proportion of all overhead and fixed charges;

(5) Pay a proper proportion of an annual depreciation and depletion charge for all property of the company within the State of Pennsylvania, used in supplying gas to consumers in the states of New York and Pa.;

(6) Pay a proper proportion of a fair return on the value of all the company's property in Pennsylvania used in supplying gas to consumers in the States of New York and Pennsylvania.

Other aspects or elements of what the rate must pay for need not here be particularized.

Is it not clear that a rate which must provide for all the foregoing things cannot be prescribed by an authority which has no jurisdiction over the great bulk of the properties on which the rate depends?

But who is to determine all these questions, especially those involving an apportionment between the two states? Manifestly, the New York commission would have to determine all of them before it could make a proper rate, and just as clearly the Pennsylvania commission, which has unquestioned jurisdiction over all the company's property and business in Pennsylvania, would have to determine all of those affecting Pennsylvania, especially those involving an apportionment, in any investigation of the company's Pennsylvania rates. It is to the interest of New York to make the amounts apportionable to that state as small as possible. It is to the interest of Pennsylvania to make the amounts apportionable to New York as large as possible, so as to leave the amount chargeable to Pennsylvania as small as possible. The commissions can be depended upon to protect the interests of consumers within their respective jurisdictions. Suppose the New York commission should say that only twenty-five per cent of all these apportionable items was properly chargeable to New York and that the Pennsylvania commission should decide that fifty per cent of the same items was properly chargeable to New York. What would the company do as to the remaining twenty-five per cent? In what kind of an action could it get relief? Courts accept the findings of fact of the commission. We

submit that not even in a suit involving due process could this court determine between the two commissions. Nothing but the commerce clause affords protection, and it must be granted in this case. But even the right, if it could be realized, of getting mere life-saving relief under the due process clause is no reason for denying protection under the commerce clause.

Other Points of Conflict.

The New York commission holds that the adequacy or inadequacy of the service is a factor in rate making,—if the services should not be up to the standard it sets, the rates must be correspondingly lower.

> "In making rates the quality of the service furnished must be considered; the public should not be required to pay for what it does not get; the burden of furnishing good service is upon the company and not upon the public, and the company must suffer and not its customers in fixing the proper rate when it appears that the company is not performing its service in a satisfactory manner."
>
> See Re proposed schedule of rates fixed by Iroquois Natural Gas Company, (Case No. 6282), Fuhrmann v. Iroquois Natural Gas Company, (Case No. 6318), before public service commission, second district, New York, opinion of Commissioner Barhite, page 49, decided April 24, 1919.

In regulating the operations in Pennsylvania the Pennsylvania commission might, through its regulation of rates or otherwise, limit the amount of revenue which should be used by the company in

procuring gas. The amount of gas obtainable by the company under the regulations which the Pennsylvania commission might make might not be sufficient to furnish the amount of gas which the New York commission thought adequate for consumers within that state. In that event, the company would be punished through a reduction of New York rates, if not fined, for conducting its operations in Pennsylvania in accordance with the regulations of the Pennsylvania commission.

It is the common law duty of a public utility to furnish reasonably adequate service. The adequacy of the service must necessarily depend on what is done is Pennsylvania. If the state of New York has power, through its commission, to prescribe reasonable rates for this interstate service, it necessarily has the power, through its commission, to compel this company to furnish adequate service to New York consumers, and to determine what shall be considered adequate service,—in other words, how it shall operate its properties *in Pennsylvania*, what size pipe lines it shall maintain *in Pennsylvania*, through which any gas passes which goes to New York, how large a pump station it shall maintain *in Pennsylvania*, how it shall operate its pump station *in Pennsylvania*, from which gas is pumped to Jamestown, in New York, and also to Warren, Corry and Erie, *in Pennsylvania*, so that Jamestown will get an adequate supply of gas. It would also have the power to determine how much gas should be pumped from the pump station *in Pennsylvania* to Jamestown, in New York, and how much to the Pennsylvania municipalities, in order to enforce the common law duty against unreasonable discrimination in supply.

Pennsylvania might adopt a policy requiring conservation of gas for the future. New York, on the other hand, require the company to supply any and every demand and even extend service and take on new consumers. New York might fix one rate for gas sold for manufacturing purposes in Jamestown, Pennsylvania might fix a higher rate for gas furnished to competing concerns in the same business in the City of Warren only twenty miles away, or as a conservation measure might even forbid sale of gas for manufacturing purposes.

The commissions of the two states might also differ as to the rate of return and rate of depreciation which should be allowed, the basis on which the rate should be computed, the order in which consumers should be supplied, etc., etc.

A reading of the New York State Public Service Act (see "Appendix A") will show the very broad powers which under it, the New York Commission can assert over all features of the business of plaintiff in error. The statute expressly grants to the commission power to prescribe equipment, etc., to be used "wherever situated." (see § 66, subd. 5 and § 76).

Pennsylvania might make conflicting regulations on all these subjects. Nevertheless, if the company failed to comply with such orders of the New York commission, it would be liable to be fined in New York, under New York law, $1,000.00 a day (see §73) for what it did or did not do in the conduct of its business *in Pennsylvania*, possibly for complying

with the regulations of the Pennsylvania commission.

We submit that the conflict of state interests is even more probable and the results to be anticipated even more disastrous than those anticipated by this court in the Covington Bridge Case (see language quoted under Point IV, supra). As there said "Congress and Congress alone possesses the requisite power to harmonize such differences."

The danger of conflict is real. Under the principle of judicial notice applied by this court in the Pure Oil Company Case, 248 U. S. 158; we assume that the court may take judicial notice of the fact, appearing in the records of the public service commission of Pennsylvania, if it be pertinent, that there is now pending before that commission a proceeding, instituted by the municipalities of Erie, Corry and Warren, in the state of Pennsylvania, and citizens thereof, against this plaintiff in error here, to prohibit it from transporting any gas from the state of Pennsylvania into the state of New York, and also the fact, appearing in the records in the United States district court for the western district of New York, that there is now pending in that court an action in equity, instituted by the city of Jamestown, one of the defendants in error in this case, against the plaintiff in error herein, to enjoin it from discontinuing the furishing of gas to consumers in the city of Jamestown; also, that it will take judicial notice of the further fact, appearing in the records and files of the Pennsylvania Public Service Commission, if it be pertinent, that the rates charged by the Pennsylvania Gas Company to consumers in the state of Pennsylvania,

are the same as those involved in this proceeding, and that the reasonableness, etc., of the Pennsylvania rates are, on complaint of the said Pennsylvania municipalities and citizens thereof, now being inquired into by the Pennsylvania Public Service Commission, which has jurisdiction thereof.

It is only necessary to keep in mind the original purpose of the commerce clause to show the propriety of its application to this case. Under the articles of confederation many of the states, by tariffs, tonnage acts and embargoes, as well as by every petty means possible, were trying to promote their own selfish interests at the expense of other states and their citizens. Thus an intolerable condition of commercial warfare had grown up, accompanied by intense and dangerous hatred among the several states. It was to remedy this condition and prevent any tendency to its recurrence that the *interstate* feature of the commerce clause was adopted. Doubtless at that early date the several states would have justified their acts on the ground that they were police regulations, intended for the protection or welfare or convenience of their own citizens, or, possibly, that some of them were merely the enforcement of common law duties of public utilities. This last reason would have been no more or less efficacious than any other. The framers of the constitution cared nothing for such reasons. What they meant to do, and did, by the commerce clause, was to put the subject of interstate commerce in such shape that the states could not possibly, by conflicting regulations or otherwise, prohibit, impede or burden such commerce.

We think it safe to say that in every case in this court which has involved an attempted state regula-

tion on interstate commerce wherein the regulation was of such a character that it might tend to give one state or its citizens any benefit or advantage over any other state or the citizens thereof, or which might lead to conflict of state regulations, or which could possibly by its operation prevent or retard commerce in sound articles thereof between the states, it has been held that the affirmative force of the commerce clause, without any action whatever by congress, was sufficient to avoid such state regulation.

It is argued that the act of congress of June 26, 1906, which made certain pipe lines subject to the interstate commerce commission meant by the exception of natural gas lines to make them subject to state jurisdiction. The pertinent provision of the said act is as follows:

> "That the provisions of this act shall apply to any corporation * * * engaged in the transportation of oil or other commodity * * * except * * * gas, by means of pipe lines," etc.

Nothing could be more illogical than the contention that that act changed the status of gas pipe lines. They were excepted from the operation of the act. *No law was made as to them.* They remain as before.

It is also urged by the defendants in error that the state must have the right to regulate gas rates or otherwise there would be no means of regulation, and the company could charge such rates as it saw fit.

The interstate natural gas business at present is in the same situation as interstate railroads were before the adoption of the interstate commerce act, as interstate oil pipe lines, express and sleeping car companies were before the amendment of June 29, 1906, as interstate electric railways, telegraphs and telephones were before the amendment of June 18, 1910, as interstate transportation wholly by water, by wagon, or by motor trucks is at present. The state regulations held invalid in the Wabash case, supra, Covington & Cincinnati Bridge Company case, supra, Hall v. DeCuir, supra, and other like cases, all affected public service corporations. The regulations involved in the Wabash case and in Hall v. De Cuir were, in substance, attempts by the state to enforce the common law duty of a public utility to furnish service without discrimination, and the regulation involved in the Covington & Cincinnati Bridge Company case was what the state regarded as an attempt to enforce the common law duty to furnish service at reasonable rates. There is no more reason for saying that the state of New York, under the guise of enforcing the common law duty of a public utility to furnish service at a reasonable rate, has power to make the proposed regulation of rates in the case at bar than there was for upholding the same contention in those cases. To do so would be to substantially overrule those and other like cases, and to disturb what has long been regarded as settled law. It is true that the plaintiff in error, when it devoted its property to public use, knew that it would be subject to public regulation, but it also knew that as to interstate commerce it was subject to the regulation of congress alone.

It is the avowed purpose of congress to leave transportation wholly by water free of regulation, in order to encourage it. It may be assumed that congress intended to leave the natural gas business unregulated for the same purpose. The purpose of leaving water transportation unregulated was to promote its development, and have a means of transportation that would compete with railroads. Doubtless the purpose of congress in leaving the natural gas business unregulated is to encourage investors to develop it, to extend it throughout the states as far as possible, and thus furnish the public a fuel to compete with coal or supplement its use.

That the states may think the interstate natural gas business needs regulation is of no consequence. It is to congress that the constitution has committed the power of determining that question. It is not for the states to say what congress should do. If the defendants in error have any grievance as to the company's rates, they can easily lay it before the proper committees of congress, and, if congress deems it a matter needing regulation, it will doubtless take appropriate action. In the meantime it is not for the state to usurp the functions of congress.

In fixing intrastate rates, for an interstate public utility, the state has no right to take in consideration the business of the company outside of the state, or base them on the value of the property outside the state.

> "The reasonableness or unreasonableness of rates prescribed by a state for the transportation of persons and property wholly within its limits must be determined without reference to the interstate business done by the carrier, or to the profits derived from it."

Smyth vs. Ames 169 U. S. 466 at 541.

Judson on Interstate Commerce, Sec. 134.

2 Willouby on Const. Sec. 343 p. 730, 731.

How can it be said that the proposed regulation is local in its operation when it is obvious that the commission must take into consideration the property of the company in the State of Pennsylvania engaged in furnishing the service in New York and *at the same time* engaged in furnishing service to three cities and several villages in the State of Pennsylvania, all from the same plant and fields. The difficulties which the State of New York will meet in that respect are obvious and cannot be overcome. This court has held that states may not adopt arbitrary ratios or percentages for the purpose of separating intrastate and interstate business, whether such ratios are based on revenue, assessment, mileage or otherwise.

Wood vs. Vandalia Ry Co., 231 U. S. 1 at p. 7.

Knot vs. Chicago B. & Q. Ry. Co., 230 U. S. 474 at 498 and 504.

Simpson vs. Shepard, 230 U. S. 352 at 459, 467 and 471.

Where state regulations necessarily operate on interstate commerce they are void regardless of the motive or asserted purpose of the state.

It is of no avail for the state to *claim* that the operation of the proposed regulation is local. This court has frequently declared state acts although expressly and specifically directed at property *lying wholly within the state* to be void because they neces-

sarily, even if only indirectly affect interstate commerce and impose a burden thereon. In Galveston H. & S. A. R. Co. vs. Texas (210 U. S. 217, 227) this court considered a state act imposing a percentage tax upon the gross receipts of railroads *lying wholly within* the state of Texas. The tax was held invalid so far as it was based on or measured by receipts from interstate transportation, the court saying.

> "Neither the state courts nor the legislature by giving the tax a particular name or by the use of some form of words, can take away our duty to consider its nature and effect. *If it bears upon commerce among the states so directly as to amount to a regulation in a relatively immediate way, it will not be saved by name or form.* Stockard vs. Morgan 185 U. S. 27, 37; Asbell vs. Kans. 209 U. S. 251, 254, 256."

The above and a large number of similar cases where state taxation and regulation of matters claimed to be local and solely within its borders but which in their operation necessarily extended beyond the state line and produced an incidental but material effect upon interstate commerce, and for that reason were declared repugnant to the commerce clause, are reviewed by this court in Western U. Teleg. Co. vs. Kansas, (216 U. S. 1, p. 22-46). In that case was involved a tax upon the percentage of capitalization for the benefit of a state school fund as a condition of doing business in the state. The court held (p. 30) "It strikes at the company's entire business wherever conducted and its property wherever located."

See also:

Illinois Central R. R. vs. Greene, 244 U. S. 553.

Union Pac. R. R. Co. vs. Public Ser. Com. 248 U. S. 67.

We submit that a state has no more right to assume jurisdiction of property outside its borders for the purpose of fixing a rate which it alleges to be intrastate than it has to assume jurisdiction of property outside of its borders for the purpose of taxation, or any other purpose.

The state has no power to fix charges for interstate commerce.

This court has repeatedly declared it to be the law that a state has no power to regulate fares and charges for interstate commerce.

> "It is not necessary to review the cases in this court which have settled beyond peradventure that the national government has exclusive authority to regulate interstate commerce under the Constitution of the United States; nor to do more than reaffirm the equally well-settled proposition that over interstate commerce transportation rates the state has no jurisdiction, and that an attempt to regulate such rates by the state or under its authority is void."

Railroad Commission v. Worthington, 225 U. S. 101, 107.

Minnesota Rate Case, supra, page 412.

L. & N. vs. Eubank 184 U. S. 27 at pp. 38, 44 and 43.

Wabash St. L. & P. Ry. Co. vs. Ill. 557 U. S. at p. 575.

The doctrine on which the defendants in error rely and are attempting to re-establish in this case

is nothing but the repudiated doctrine of Peik vs. C. & N. W. Ry. Co. 94 U. S. 164, in which state regulation of interstate rates was apparently upheld, but which was expressly overruled by this court in the Wabash case, supra.

The Federal Principle Must Prevail.

If this case be regarded as involving a conflict between the principle that a state may make certain regulations involving interstate commerce and the vital principle that, in the absence of action by congress, a state may not make any regulation which impedes interstate commerce, the federal rule must prevail.

> "Wherever the interstate and intrastate transactions of carriers are so related that the government of the one involves the control of the other, it is Congress, and not the state, that is entitled to prescribe the final and dominant rule, for otherwise Congress would be denied the exercise of its constitutional authority, and the state, and not the nation, would be supreme within the national field."
> Shreveport Rate Case, 234 U. S. 342 at 351.

While the foregoing statement was made with reference to state regulation of intrastate rates which affected interstate rates prescribed under authority of the interstate commerce commission, it applis a fortiori to an attempted state regulation of interstate rates.

> "It has been suggested by counsel that the situation presents a clash between the principle that a state may control public utilities doing business within its bundaries and the principle that a state may not directly impose

> a burden on interstate commerce. If there is such a clash between these two principles, then I am clearly of the opinion that the decision must be in favor of the principle that the state may not directly burden or interfere with interstate commerce. That principle must prevail, rather than the principle that the state under all circumstances must have the fullest control over a public utility doing business within its borders."
>
> Landon v. Public Utilities Commission, 245 Fed. Rep. 950 at 953-954.

In fixing the gas rates in question, the state necessarily regulates the rate or return for the interstate transportation of the gas, and that is beyond its power.

Conceededly the proposed regulation is not local in its sphere of operation if it affects interstate transportation directly or indirectly in a substantial way.

The Court of Appeals recognizes that the *Wabash* case conclusively determined that Federal jurisdiction over interstate transportation rates is exclusive, but it asserted that such exclusive jurisdiction is limited to transportation rates (p. 53) and concluded that the state might regulate the rates in question because "there is here no regulation of transportation" (p. 54). We believe that it is easy to demonstrate that the premises as well as the conclusion is incorrect.

The *conclusion* that "there is here no regulation of transportation" seems to us utterly inconsistent with the *finding* made by the court in the first part

of its opinion that the business in question is interstate commerce because "the *transportation* of oil or *gas* from state to state through the medium of pipe lines *is commerce between the states*" and that the *sale is* a part of *such commerce* because "*there is no break in the continuity of the transmission from the pumping station in Pennsylvania to home and office and factory in Jamestown.*" (See opinion pp 50, 51).

Certainly the antagonism of these two statements is most surprising. The feature which makes the business in question interstate commerce is the transmission of gas from one state for sale in another state (West vs. Kansas Nat. Gas Co., 221 U. S. 229).

The fact that the interstate transmission is not accomplished through a common carrier, but is performed by the person who owns and is selling the goods, does not make such transmission any the less interstate transportation. This court has repeatedly repudiated attempts to make such a distinction. The owner has the right to avail himself of such means of transportation as he prefers. In Railroad Commission vs. Worthington, (225 U. S. 101) the owner of coal transported it in interstate commerce in his own vessels. In Kirmeyer vs. Kansas (236 U. S. 568) the owner carried the liquor across the state bridge in his own wagons. In Kelley vs. Rhoades (188 U. S. at p. 9) the sheep were driven across state lines by their owners. All these transactions were held to be interstate transportation and interstate commerce.

In the Pipe Line cases (234 U. S. 548) except as to the Uncle Sam Oil Co., (p.562) which did not pipe its oil for the purpose of sale, but to its own

refinery, this court held that all the companies were engaged in interstate commerce, saying as to them (p. 560):

> * * * "The fact that the oils transported belonged to the owner of the pipe line is not conclusive against the transportation being such commerce. (Rearick vs. Pennsylvania, 203 U. S. 507, 512. See Texas and N. R. R. Co. vs. Sabine Tram Co., 227 U. S. 111). The situation that we have described would make it illusory to deny the title of commerce to such transportation, beginning in purchase and *ending in sale* for the same reasons that make it *transportation* within the Act. * * *"

In saying that transportation is not involved in the regulation, the learned Court of Appeals apparently overlooked the fact that under the statutes of New York gas corporations are "*Transportation Corporations*" (see Appendix B) and that the jurisdiction of the defendant commission in the premises is limited to such companies as use the public highways for the *transportation* of gas for public use (see § 66, subd. 1, "Appendix A"). Except for this interstate transportation, the Pennsylvania gas could not be delivered and sold to the New York consumers.

IN CONCLUSION.

We respectfully submit that the judgment of the state courts here sought to be reversed deprives the plaintiff in error of a vital constitutional right —the right to conduct its interstate business free from the conflicting regulations of different states. It is idle for the Court of Appeals to say that there

is here no possibility for clashing interests of different localities. In seeking self-interest, human nature makes no distinction between a railroad company and a gas company. To draw a distinction between transportation by a common carrier and the transportation and sale of natural gas is to quibble over words and lose sight of substance. The interstate business of this company should not be denied the constitutional protection which other companies in other kinds of interstate transportation and business enjoy. The decision of this case will fix the rule for the natural gas business throughout the nation. We submit with confidence that this court will not abandon an important and growing national industry to the conflicting interests and regulations of the states. Therefore:

We respectfully submit that the judgments of the Supreme Court of the State of New York entered upon remittitur from the Court of Appeals and the like order and judgment entered upon the decision of the Appellate Division, Third Department, dismissing the writ of prohibition should be reversed and the writ of prohibition be reinstated.

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APPENDIX A.

Public Service Commission Law.

The relevant provisions of the Public Service Commissions Law of New York (Laws 1910, Chap. 480; Consol. Laws chap. 48) are as follows:

Article 1, § 2, **Definitions**—subd. 10,

> * * * "The term 'gas plant,' when used in this chapter, includes all real estate, fixtures and personal property operated, owned, used or to be used for or in connection with or to facilitate the manufacture, distribution, sale or furnishing of gas (natural or manufactured) for light, heat or power.
>
> 11. "The term 'gas corporation,' when used in this chapter, includes every corporation, company, association, joint-stock association, partnership and person, their lessees, trustees or receivers appointed by any court whatsoever, owning, operating or managing any gas plant except where gas is made or produced and distributed by the maker on or through private property solely for its own use or the use of its tennants and not for sale to others. * * *"

"Article 4:—Provisions Relating to Gas Corporations and Electrical Corporations; Regulation of Price of Gas and Electricity." * * *

> §64—"**Application of article.** This article shall apply to the manufacturer and furnishing of gas for light, heat or power, and the furnishing of natural gas for light, heat or power, and the generation, furnishing and transmission of electricity for light, heat or power.

65. **Safe and adequate service; just and reasonable charges; unjust discrimination; unreasonable preference.** Every gas corporation, every electrical corporation and every municipality shall furnish and provide such service, instrumentalities and facilities as shall be safe and adequate and in all respects just and reasonable. All charges made or demanded by any such gas corporation, electrical corporation or municipality for gas, electricity or any service rendered or to be rendered, shall be just and reasonable and not more than allowed by law or by order of the commission having jurisdiction. Every unjust or unreasonable charge made or demanded for gas, electricity or any such service, or in connection therewith, or in excess is prohibited. * * *

66. **General powers of commissions in respect to gas and electricity.** Each commission shall within its jurisdiction:—

1. Have general supervision of all gas corporations and electrical corporations having authority under any general or special law or under any charter or franchise to lay down, erect or maintain wires, pipes, conduits, ducts or other fixtures in, over or under the streets, highways and public places of any municipality, for the purpose of furnishing or distributing gas or of furnishing or transmitting electricity for light, heat or power, or maintaining underground conduits or ducts for electrical conductors, and all gas plants and electric plants owner, leased or operated by any gas corporataion or electrical corporation. * * *

5. Examine all persons, corporations and municipalities under its supervision and keep informed as to the methods, practices, regulations and property employed by them in the transaction of their business. Whenever the commission shall be of opinion, after a hearing

had upon its own motion or upon complaint, that the rates or charges or the acts or regulation of any such person, corporation or municipality are unjust, unreasonable, unjustly discriminating or unduly preferential or in anywise in violation of any provision of law, the commission shall determine and prescribe the just and reasonable rates and charges thereafter to be in force for the service to be furnished notwithstanding that a higher rate or charge has heretofore been authorized by statute, and the just and reasonable acts and regulations to be done and observed; and whenever the commission shall be of opinion, after hearing had upon its own motion or upon complaint, that the property, equipment or appliances of any such person, corporation or municipality are unsafe, inefficient or inadequate, the commission shall determine and prescribe the safe, efficient and adequate property, equipment and appliances thereafter to be used, maintained and operated for the security and accommodation of the public and in compliance with the provisions of law and of their franchises and charters. * * *

8. Have power, either through its member or inspectors or employees duly authorized by it, to enter in or upon and to inspect the property, buildings, plants, factories, power houses, ducts, conduits and offices of any of such corporations, persons or municipalities.

9. Have power to examine the accounts, books, contracts, records, documents and papers of any such corporation, person or municipality, and have power, after hearing, to prescribe by order the accounts in which particular outlays and receipts shall be entered, charged or credited.

10. Have power to compel, by subpoena duces tecum, the production of any accounts,

books, contracts, records, documents, memoranda and papers. * * *

12. Have power to require every gas corporation, electrical corporation and municipality to file with the commission and to print and keep open to public inspection schedules showing all rates and charges made, established or enforced or to be charged or enforced, all forms of contract or agreement and all rules and regulations relating to rates, charges or service used or to be used and all general privileges and facilities granted or allowed by such gas corporation, electrical corporation or municipality; but this subdivision shall not apply to state, municipal or federal contracts. Unless the commission otherwise orders, no change shall be made in any rate or charge, or in any form of contract or agreement or any rule or regulation relating to any rate, charge or service, or in any general privilege or facility, which shall have been filed and published by a gas corporation, an electrical corporation or municipality in compliance with an order of the commission, except after thirty days' notice to the commission and publication for thirty days as required by order of the commission, which shall plainly state the changes proposed to be made in the schedules then in force and the time when the change will go into effect. The commission for good cause shown may allow changes without requiring the thirty days' notice under such conditions as it may prescribe. No corporation or municipality shall charge, demand, collect or receive a greater or less or different compensation for any service rendered or to be rendered than the rates and charges applicable to such services as specified in its schedule filed and in effect at the time; nor shall any corporation or municipality refund or remit in any manner or by any device any portion of the rates or charges so specified, nor to extend to any per-

son or corporation any form of contract or agreement, or any rule or regulation, or any privilege or facility, except such as are regularly and uniformly extended to all persons and corporations under like circumstances. The commission shall have power to prescribe the form of every such schedule, and from time to time prescribe the form of every such schedule, and from time to time prescribe by order such changes in the form thereof as may be deemed wise. The commission shall also have power to establish such rules and regulations to carry into effect the provisions of this subdivision as it may deem necessary, and to modify or amend such rules or regulations from time to time. * * *"

§ 71. **Complaints as to quality and price of gas and electricity; investigation by commission; forms of complaints.** Upon the complaint in writing of a mayor of a city, the trustees of a village or the town board of a town in which a person or corporation is authorized to manufacture, sell or supply gas or electricity for heat, light or power, or upon the complaint in writing of not less than one hundred customers or purchasers of gas or electricity in cities of the first or second class, or of not less than fifty in cities of the third class, or of not less than twenty-five elsewhere, or upon complaint of a gas corporation or electrical corporation supplying said gas or electricity, as to the illuminating power, purity, pressure or price of gas, the efficiency of the electric incandescent lamp supply, the voltage of the current supplied for light, heat or power, or price of electricity sold and delivered in such municipality, the proper commission shall investigate as to the cause of such complaint. When such complaint is made, the commission may, by its agents, examiners and inspectors, inspect the works, system, plant, devices, appliances and methods used by such person or corporation

in manufacturing (transmitting and supplying such gas or electricity, and may examine or cause to be examined the books and papers of such person or corporation pertaining to the manufacture, sale, transmitting and supplying of such gas or electricity. The form and contents of complaints made as provided in this section shall be prescribed by the commission. Such complaints shall be signed by the officers, or by the customers, purchasers or subscribers making them, who must add to their signatures their places of residence, by street and number, if any.

§ 72. **Notice and hearing; order fixing price of gas or electricity or requiring improvement.** Before proceeding under a complaint presented as provided in section seventy-one, the commission shall cause notice of such complaint, and the purpose thereof, to be served upon the person or corporataion affected thereby. Such person or corporation shall have an opportunity to be heard in respect to the matters complained of at a time and place to be specified in such notice. An investigation may be instituted by the commission as to any matter of which complaint may be made, as provided in section seventy-one of this chapter, or to enable it to ascertain the facts requisite to the exercise of any power confered upon it. After a hearing and after such an investigation as shall have been made by the commission or its officer, agents, examiners or inspectors, the commission within lawful limits may, by order, fix the maximum price of gas or electricity not exceeding that fixed by statute to be charged by such corporation or persons, for the service to be furnished; any may order such improvement in the manufacture, distribution or supply of gas, in the manufacture, transmission or supply of electricity, or in the methods employed by such person or corporation, as will

in its judgment be adequate, just and reasonable. The price fixed by the commission under this section or under subdivision five of section sixty-six shall be the maximum price to be charged by such person, corporation or municipality for gas or electricity for the service to be furnished within the territory and for a period to be fixed by the commission in the order, not exceeding three years except in the case of a sliding scale, and thereafter until the commission shall, upon its own motion or upon the complaint of any corporation, person or municipality interested, fix a higher or lower maximum price of gas or electricity to be thereafter charged. In determining the price to be charged for gas or electricity the commission may consider all facts which in its judgment have any bearing upon a proper determination of the question although not set forth in the complaint and not within the allegations contained therein, with due regard among other things to a reasonable average return upon capital actually expended and to the necessity of making reservations out of income for surplus and contingencies.

§ 73. **Forfeiture for non-compliance with order.** Every gas corporation and electrical corporation and the officers, agents and employees thereof shall obey, observe and comply with every order made by the commission under authority of this chapter so long as the same shall be and remain in force. Any such person or corporation, or any officer, agent or employee thereof, who knowingly fails or neglects to obey or comply with such order, or any provision of this chapter, shall forfeit to the state of New York not to exceed the sum of one thousand dollars for each offense. Every distinct violation of any such order or of this chapter shall be a separate and distinct offense, and in case of a continuing violation each day shall be deemed a separate and distinct offense.

§ 74. **Summary proceedings.** Whenever either commission shall be of opinion that a gas corporation, electrical corporation or municipality within its jurisdiction is failing or omitting or about to fail or omit to do anything required of it by law or by order of the commission or is doing anything or about to do anything or permitting anything or about to permit anything to be done, contrary to or in violation of law or of any order of the commission, it shall direct counsel to the commission to commence an action or proceeding in the supreme court of the state of New York in the name of the commission for the purpose of having such violations or threatened violations stopped and prevented either by mandamus or injunction. Counsel to the commission shall thereupon begin such action or proceeding by a petition to the supreme court alleging the violation complained of and praying for appropriate relief by way of mandamus or injunction. It shall thereupon be the duty of the court to specify the time not exceeding twenty days after service of a copy of the petition within which the gas corporation, electrical corporation or municipality complained of must answer the petition. In case of default in answer or after answer, the court shall immediately inquire into the facts and circumstances in such manner as the court shall direct without other or formal pleadings, and without respect to any technical requirement. Such other persons or corporations, as it shall seem to the court necessary or proper to join as parties in order to make its order, judgment or writs effective, may be joined as parties upon application of counsel to the commission. The final judgment in any such action or proceeding shall either dismiss the action or proceeding or direct that a writ of mandamus or an injunction or both issue as prayed for in the petition or in such modified

or other form as the court may determine will afford appropriate relief.

§ 75. **Defense in case of excessive charges for gas or electricity.** If it be alleged and established in an action brought in any court for the collection of any charge for gas or electricity, that a price has been demanded in excess of that fixed by the commission or by statute in the municipality wherein the action arose, no recovery shall be had therein, but the fact that such excessive charges have been made shall be a complete defense to such action.

§ 76. **Jurisdiction.** The words "proper commission," when used in this article, mean the commission of the district within which the person or corporation affected supplies or proposes to supply the whole or the greater part of the service rendered by it. But nothing herein contained shall be construed to deprive the commission of either district of the power of supervision and regulation within its district. And either commission shall have power to enter and inspect the plant of such corporation, wherever situated. * * *"

APPENDIX B.

Transportation Corporations Law.

Under article 7 of the Transportations Law, (laws of 1909, chap. 219; Consol. Laws chap. 63), are found the following provisions:—

§ 60. **Incorporation.** Three or more persons may become a corporation for manufacturing and supplying gas for lighting the streets and public and private buildings of cities, villages and towns in this state, or for

manufacturing and using electricity for producing light, heat or power, and in lighting streets, avenues, public parks and places, and public and private buildings of cities, villages and towns within this state, or for two or more of such purposes, by making, signing, acknowledging and filing a certificate stating the name of the corporation, its objects, the amount of its capital stock, the term of its existence not to exceed fifty years, the number of shares of which the stock shall consist, the number of directors not less than three nor more than thirteen, the names and places of residence of the directors for the first year, and the names of the towns, villages, cities and counties in which the operations of the corporation are to be carried on, and thereupon, the persons who shall have signed the same, their associates and successors shall be a corporation by the name stated in the certificate.

§ 61. **Powers.** Every such corporataion shall have the following additional powers:

1. If incorporated for the purpose of supplying gas for light, to manufacture gas and to acquire by purchase or otherwise natural gas as may be required in each city, town and village named in its certificate of incorporation, for lighting the streets, and public or private buildings or for other purposes; and to lay conductors for conducting gas through the streets, lanes, alleys, squares and highways, in each such city, village and town, with the consent of the municipal authorities thereof, and under such reasonable regulations as they may prescribe; and such municipal authorities shall have power to exempt any such corporation from taxation on its personal property for a period not exceeding three years from the organization of the corporation. Any corporation authorized under any

general or special law of this state to manufacture and supply gas shall have the like powers and privileges."

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In the

Supreme Court of the United States

October Term. 1919.

No. 330.

PENNSYLVANIA GAS COMPANY,
Plaintiff in Error,

v.

PUBLIC SERVICE COMMISSION, Second District, of the State of New York, the City of Jamestown, New York, et. al.

IN ERROR TO THE SUPREME COURT OF THE STATE OF NEW YORK.

REPLY BRIEF FOR PLAINTIFF IN ERROR.

MARION H. FISHER
and
JOHN E. MULLIN,
For Plaintiff in Error.

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POINT I.

The question of the propriety of the writ of prohibition, sought to be raised by point I. of the brief on behalf of the city of Jamestown, and Point IV. of the brief on behalf of the Public Service Commission, Second District, State of New York, defendants in error, is not an open one.

It is settled that a judgment of the highest court of a state finally disposing of a writ of prohibition is reviewable by this court on writ of error, although such judgment did not determine the merits of the principal suit.

> Mt. Vernon-Woodberry Cotton Duck Co. v. Alabama Interstate Power Co., 240 U. S. 30, 60 L. ed. 507.
>
> Weston v. Charleston, 2 Peters, 449, 7 L. ed. 481.

The same considerations here urged by defendants in error on this subject were urged before Justice Hasbrouck on the argument at special term of the supreme court of the state of New York, who held the writ was available before trial on the merits (printed record, 45), and granted it. The defendants in error raised the same question before the appellate division and the court of appeals, and it was disregarded by both courts.

It is settled law in New York, as well as in other states, that a writ of prohibition may issue to a public service commission which is proceeding in a matter over which it has no jurisdiction, although the right to review the commission's action by certiorari exists.

> "Prohibition is the proper remedy against a Public Service Commission assuming to act in a case not within its jurisdiction."
>
> Quinby v. Public Service Commission, 2nd Dis., N. Y., 223 N. Y. 244, 119 N. E. 433, P. U. R. 1918D, 30.

Huntingdon Chamber of Commerce v. Public Service Commission (W. Va. Ct. of App.),——W. Va.——, 99 S. E. 285, P. U. R. 1919D, 968.

Atchison, Topeka & Santa Fe R. R. Co. v. Corporation Commission (Okla. Sup. Ct.),——Okla. ——, 170 Pac. 1156, P. U. R. 1918C, 598.

Questions of local practice determined by state courts are not open for review in this court.

Bi-Metallic Investment Co. v. State Board, 239 U. S. 441, 60 L. ed. 372.

Chicago R. I. & P. R. Co. v. Whiteaker, 239 U. S. 421, 60 L. ed. 360.

Perryman v. Woodward, 238 U. S. 148, 152, 59 L. ed. 1242, 1244.

POINT II.

The protection of interstate commerce from state regulation afforded by the commerce clause is not limited to common carriers, as implied in the brief on behalf of the Public Service Commission, Second District, State of New York.

International Paper Company v. Massachusetts, 246 U. S. 135, 142, 64 L. ed. 624, 629.

Looney v. Crane Co., 245 U. S. 178, 62 L. ed. 230.

Text Book Co. Case, 217 U. S. 91, 54 L. ed. 678.

Brennan v. Titusville, 153 U. S. 289, 38 L. ed. 719.

See also cases cited at pages 16-17 of principal brief of plaintiff in error on original package doctrine.

This case involves an interpretation of the Constitution, not of the Interstate Commerce Acts. Therefore, the fact that plaintiff in error is not a common carrier is not pertinent.

POINT III.

The finding of the court of appeals that, "there is no break in the continuity of the transmission from pumping station in Pennsylvania to home and office and factory in Jamestown. * * * It is enough to hold that where there is in substance no storage, but merely transmission for immediate or practically immediate use, direct from seller to consumer, interstate commerce does not end until the gas has reached its goal. That, by the fair intendment of the petition, is the business conducted by the petitioner * * * the transmission is as continuous and rapid as science can make it,' " (printed record, 51), is a finding of fact, based on the evidence (the pleadings) and is conclusive.

Interstate Amusement Company v. Albert, 239 U. S. 560, 60 L. ed. 439.

German Savings and Loan Society v. Dormitzer, 192 U. S. 125, 48 L. ed. 373.

Minneapolis, St. Louis R. R. Co. v. Minnesota, 193 U. S. 53, 48 L. ed, 614.

Kerfoot v. Farmers & Merchants Bank, 218 U. S. 281 at 288, 54 L. ed. 1042, 1044.

POINT IV.

Even if the determination by the court of appeals that the transaction in its entirety is interstate commerce should be regarded as a conclusion of law instead of a finding of fact, we submit that it is a conclusion necessarily resulting from the finding of fact by the court of appeals, as stated in Point III, supra.

The contention of counsel for the defendants in error that the conclusion of the court of appeals that the busi-

ness of the plaintiff in error, including the delivery of the gas to the consumers, is interstate commerce, is erroneous, is not based on any claim that such conclusion does not necessarily follow from the facts found by the court of appeals, as above set forth. On the contrary, it impliedly recognizes that the conclusion necessarily results from the facts as so determined, and they seek to avoid the effect thereof by setting up a different statement of the facts, claiming that there is stoppage and storage in transit, that the destination of the gas is Jamestown, and not the consumers, that the gas is sold as called for, etc. (see brief on behalf of the city of Jamestown, pages 14, 18-19, 26, 31), which is directly contrary to the finding of the court of appeals. While the brief on behalf of the Public Service Commission, Second District, State of New York, does not expressly set up the same contention that is made on behalf of the city of Jamestown, it impliedly does so, by setting up facts different from those found by the court of appeals, and by reverting to the original package theory, which was expressly repudiated by the court of appeals (see brief on behalf of Public Service Commission, page 4-6).

Under the authority of the Foster case (247 U. S. 105, 62 L. ed. 1006), it seems to us that the proposition stated in this point is beyond serious controversy.

POINT V.

The admission of defendants in error that the rates in this case may be regulated by Congress when it sees fit to do so is fatal to their contention that the business is not interstate commerce.

It is conceded by defendants in error that Congress may regulate the rates of the defendant in error involved in this case whenever it sees fit to do so (see brief on be-

half of city of Jamestown, page 7, and brief on behalf of Public Service Commission, page 44, printed record, 50). This is flatly inconsistent with their contention, especially with that made in the brief on behalf of the city of Jamestown, that the distribution of the gas is a purely local matter and constitutes no part of interstate commerce (see brief on behalf of the city of Jamestown, pages 18-19). If it were true as there contended that the delivery of the gas to consumers in Jamestown by the defendant in error is a purely local matter, constituting no part of interstate commerce, it would necessarily result that congress could not regulate its rates; because there is no pretense that the regulation of such rates would react upon and discriminate against any other interstate commerce over which congress did have control, as in the Shreveport Rate Case, infra, the Minnesota Rate Case, infra, the Illinois Rate Case, infra, and American Express Company v. South Dakota, infra.

Certain Cases cited by Defendants in Error distinguished.

But few of the cases cited by counsel for the defendants in error require special notice, and those only because, from the generality of the language quoted from or used in them, they are apt to be misleading.

Budd v. State of New York, 143 U. S. 517, 36 L. ed. 247.

This case involved the right of the state of New York to regulate charges for elevating grain. The service was performed wholly within the state of New York. The reference in the opinions of the courts in the case to the extent and character of the commerce in grain transported in interstate commerce and handled through elevators was merely for the purpose of showing the public character of the business, to sustain the proposition that it is subject to public control. There was no pretense in the case that the rates regulated paid for

anything done outside the state. There was no possibility of a conflict of regulations of different states affecting any part of the transaction regulated. It is clear from the following language of this court in that case that it is not an authority on the proposition that a state may make a rate which must pay for that part of an interstate service which is rendered outside the state:

> "So far as the statute in question is a regulation of commerce, it is a regulation of commerce only on the waters of the state of New York. It operates only within the limits of that state, and is no more obnoxious as a regulation of interstate commerce than was the statute of Illinois in respect to warehouses in Munn v. Illinois. It is of the same character with navigation laws in respect to navigation within the state, and laws regulating wharfage rates within the state and other kindred laws." (L. ed. 256).

Munn v. Illinois, 94 U. S. 113, 24 L. ed. 77.

This case involved the power of the state to fix the charges of a warehouse doing business within the state. The case was much like the Budd case which followed it. There was no pretense that the rates involved paid for anything outside the state.

If a traveler from New York to San Francisco should, in Chicago, in the course of the journey, go by trolley car from one railrord station to another, no one would contend, in the absence of action by congress, that the state of Illinois could not prescribe the fare for such trolley ride. While he would be making an interstate trip, the ride in the trolley car of itself would not be interstate commerce. In principle, the charges regulated in the Budd and Munn cases have no more bearing on interstate commerce than would the fare for such trolley ride.

State ex rel. Bristow v. Landon, 100 Kansas 593, 165 Pac. 1111.

This case is a different aspect of the same case reported as State v. Flannelly, 96 Kan. 372, distinguished

at page 46 of principal brief of defendants in error. It merely reaffirms the ruling made in that case. While the decision is ostensibly based on the ground that the natural gas business is local, not national, in character, it should be borne in mind that in that case the gas was distributed to consumers by local companies to which it was delivered by the Kansas Natural Gas Company, which transported most of it from the state of Oklahoma, and that the gas brought in from Oklahoma was commingled with gas produced in Kansas.

It is significant also that while the court, in the original case, based its decision largely on the original package doctrine (152 Pac. Rep. 26), that theory was expressly abandoned in a subsequent aspect of the same litigation (Landon v. P. U. C., 242 Fed. 682), where it is said by the court:)

> "Counsel for the commission, however, have repudiated the original package idea, and in their brief state: 'There is no original package where the transportation is conducted by means of a pipeline. Gas so conducted is not susceptible of delivery in original package."

and that that theory does not reappear in the Bristow case. (Counsel for the commission in the Federal court also represented it in the state court.

It also appears from the earlier case that the court got its idea that the natural gas business is local, not national, in character from the case of Jamison v. Indiana Natural Gas & Oil Company, which is distinguished at page 45 of the original brief of plaintiff in error, and also based its judgment that the state has power to regulate the rates on the Ott case, which is also distinguished at page 45 of the original brief of plaintiff in error.

Peoples Natural Gas Company v. Public Service Commission, officially reported as Franke v. Johnstown Fuel Supply Company, 70 Pa. Sup. Ct. 446.

> "This is an appeal by the Peoples Natural Gas Company from an order of the Public Service Commission requiring the appellant to file its tariff and schedule of rates covering its service in supplying natural gas to the Johnstown Fuel Supply Compnny, a corporation engaged in the furnishing of natural gas in the city of Johnstown." (opinion of court, page 450).

The Peoples Natural Gas Company denied tnat the part of its busines involved in that case was a public service. A large part of the discussion of the superior court is devoted to showing that the company's business was a public service and, therefore, subject to public control. But aside from this consideration, the case, on its facts, is not like the case at bar. The Peoples Natural Gas Company was a Pennsylvania corporation. Part of its gas it produced in Pennsylvania, and part it obtained from another company at the West Virginia state line (page 458). The gas obtained from West Virginia, "after passing into the ownership and custody of the Peoples Natural Gas Comyany" was "mingled with the gas produced by it in Pennsylvania" (page 459). "It was not consigned from one state to a terminus in another. It was delivered into the containers of the appellant in the state of Pennsylvania and controlled by the latter in its distribution from place to place, ***and so mingled with the Pennsylvania gas that its identity as an imported product was entirely lost***". Of course, in accordance with numerous decisions of this court affecting goods shipped in interstate commerce, whenever gas from West Virginia became commingled with the general property of Pennsylvania, it became subject to the laws of Pennsylvania.

Fayette County Gas Company v. Public Service Commission, 70 Pa. Sup. Ct. 472.

This case has no more bearing on the case at bar than does Franke v. Johnstown Fuel Supply Company, supra, which it followed. The superior court states the distinction between the two as follows:

> "This is an appeal from an order of the Public Service Commission of Pennsylvania, and involves one of the questions considered in the decision in Louis Franke v. Johnstown Fuel Supply Company, etc., 70 Pa. Sup. Ct. 446. The distinction between the cases is that the Fayette County Gas Company is a corporation of the state of West Virginia, and ***is engaged in the production and supply of natural gas in Pennsylvania.***" (pages 472-473).

As the plaintiff in error produces no gas in New York, the Fayette case is not germane. There being in the case at bar no commingling of the gas from Pennsylvania with gas in New York, none of the decisions in these gas cases has any bearing on the case at bar. The ***dicta*** appearing in the opinions are of no importance.

Illinois Central Railroad Co. v. Public Utilities Commission, 245 U. S. 493, 62 L. ed. 425.

The language quoted from this case at page 13 of the brief on behalf of the city of Jamestown, defendant in error, was not used with reference to the alleged power of the state to make regulations of interstate commerce, but of the power of the state to make regulations of intrastate commerce. The question in that case was the power of the Interstate Commerce Commission to make an order directing a change of intrastate rates prescribed by state authority, to remove a discrimination against interstate commerce. The question was substantially the same as in the Minnesota Rate Case. It was held that the order of the commission was too indefinite to be enforced. The same character of question was before this court in the Shreveport Rate Case, 234 U. S. 342, 58 L. ed. 1341, and American Express Company v. South Dakota, 244 U. S.

617, 61 L. ed. 1352, in both of which the state regulations of intrastate rates were set aside. Only those who lose sight of the facts before the court in the cases to which such language applies are mislead by the generality of the language.

Is not the statement justified that the court of appeals repudiated the ground on which the defendants in error seek to uphold the jurisdiction of the state in this case, and that counsel for the defendants in error now repudiate the theory on which the court of appeals sustained the state's power?

Respectfully submitted,

MARION H. FISHER,
JOHN E. MULLIN,
Attorneys for Plaintiff in Error.

Office Supreme Court, U. S.
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IN THE

Supreme Court of the United States

OCTOBER TERM, 1919.

No. 330

PENNSYLVANIA GAS COMPANY

Plaintiff in Error

against

PUBLIC SERVICE COMMISSION, SECOND DISTRICT, OF THE STATE OF NEW YORK, CITY OF JAMESTOWN, NEW YORK, ET AL.

Defendants in Error

BRIEF FOR DEFENDANT PUBLIC SERVICE COMMISSION

[WRIT OF ERROR TO THE SUPREME COURT OF THE STATE OF NEW YORK]

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PENNSYLVANIA GAS COMPANY
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PUBLIC SERVICE COMMISSION, SECOND DISTRICT, OF THE STATE OF NEW YORK, CITY OF JAMESTOWN, NEW YORK, *et al.*
Defendants in Error

BRIEF FOR DEFENDANT PUBLIC SERVICE COMMISSION

POINT I

The decision of the Court in *Public Utilities Comm.* v. *Landon*, 249 U.S. 236, is conclusive unless the fact that the Pennsylvania Gas Company is a Foreign Corporation gives it a privilege in the State of New York which a Domestic Corporation engaged in the same service could not claim.

1 Counsel for the Public Service Commission will assume that the Court will commence in this case where it left off in the *Landon* case (249

U. S. 236). In that case Mr. Justice McReynolds said (p. 245):

'. . . in no proper sense can it be said, 'under the facts here disclosed, that sale and 'delivery of gas to their customers at burner-tips 'by the local companies operating under special 'franchises constituted any part of interstate 'commerce. The companies received supplies 'which had moved in such commerce and then 'disposed thereof at retail in due course of their 'own local business. Payment to the receivers 'of sums amounting to two-thirds of the product 'of these sales did not make them integral parts 'of their interstate business. In fact, they lacked 'authority to engage by agent or otherwise in 'the retail transactions carried on by the local 'companies. Interstate commerce is a practical 'conception and what falls within it must be 'determined upon consideration of established 'facts and known commercial methods. [Citing 'cases.] The thing which the receivers actually 'did was to deliver supplies to local companies. 'Exercising franchise rights, the latter distrib-'uted and sold the commodity so obtained upon 'their own account and paid the receivers what 'amounted to two-thirds of their receipts from 'customers. *Interstate movement ended when 'the gas passed into local mains.** The court 'below erroneously adopted the contrary view 'and upon it rested the conclusion that the Public 'Commissions were interfering with establish-'ment of compensatory rates by the receivers in 'violation of their rights under the Fourteenth 'Amendment.

'The challenged orders related directly to 'prices for gas at burner-tips and only indirectly 'to the receivers' business. They were under no 'compulsion to accept unremunerative prices; 'even the original supply contracts had not been 'adopted and were subject to rejection. [Citing

* Italics ours.

'case.] Our conclusion concerning relationship 'between the receivers and local companies ren- 'ders it unnecessary to discuss the effect of rates 'prescribed for the latter.'

The *Landon* case was a reversal of the companion insolvency receivership cases of *Landon* v. *Public Utilities Commission* [1916] 234 Fed. 152, *Landon* v. *Public Utilities Commission* [Apr. 1917] 242 Fed. 658, and *Landon* v. *Public Utilities Commission of Kansas* [Aug. 1917] 245 Fed. 950; and was in harmony with the decision of the Supreme Court of Kansas in *State ex rel.* v. *Flannelly* [1915] 96 Kan. 372, *S.C.* [1916] 96 Kan. 833, *State ex rel.* v. *Litchfield,* 97 Kan. 592, and *State ex rel.* v. *Gas. Co.* [1917] 100 Kan. 593, 596–597, involving the same corporations, and to the same effect as *Manufacturers' Heat & Light Co.* v. *Ott* [1914] 215 Fed. 940, 944–945, and *Pipe Line Cases* [1914] 234 U. S. 548, 561–562, 573, 575.

In addition to the Federal authorities referred to and the New York decision under review the same result has been reached in Maryland (*West Virginia & Maryland Gas Co.* v. *Towers* [March 1919] 106 Atl. 265) and in Pennsylvania (*Peoples Natural Gas Company* v. *Public Service Commission,* decided by Superior Court of Pennsylvania in October 1918 [Superior Court Opinion No. 55], and *Fayette County Gas Company* v. *Public Service Commission,* decided by the same court at the same time [Superior Court Opinion No. 54]).

In the Maryland case two natural gas corporations were plaintiffs, each with the name West Virginia & Maryland Gas Company, one organized under the laws of West Virginia and one under the laws of Maryland, the West Virginia corpora-

tion being engaged in the production of natural gas which it sold to the Maryland corporation, which transported it from the point of delivery in West Virginia across the state line and distributed it to its various patrons in the city of Cumberland and other points in Allegany county, Maryland. The claim was made that the business of the latter company was not only interstate but that its interstate character controlled its entire service, and hence that it was thereby exempted from the control of the Maryland Public Service Commission. The Maryland Court of Appeals rejected the claim and held that the plaintiff natural gas corporations were as to their local public service under the control of the state commission.

The Pennsylvania cases referred to present different phases of the subject-matter, but are to the same effect as the decision under review and the decision of the Maryland Court of Appeals.

2 The Court will observe that the Maryland Court of Appeals likened the subject-matter, as did the Kansas Supreme Court, to the principle illustrated by the " original package " cases. Of course if the original package decisions, especially the *Hardin* case (135 U. S. 100), were *just like* this case there would be an end of analogy and the only question left would be whether this Court would follow its decision made in 1890. It is submitted that the *Hardin* case is a great deal nearer an authority for than against the jurisdiction of the commission. If natural gas were brought to Jamestown in containers under pressure the *Hardin* case would be a direct authority that the Pennsylvania Gas Company might sell a container with its contents to a Jamestown householder, who

could turn a key and have the benefit of the gas the same as he turns on the gas now. And of course the same result would follow if title to the container remained in the Pennsylvania Gas Company and only the gas was sold, the container being sent back to the Pennsylvania well for another charge.

Here plainly we have the equivalent of the keg of beer in the *Hardin* case. It is manifest from the *Hardin* case that the beer keg with its protected contents would lose its immunity under Federal authority the moment it was set up on a bar and the contents drawn and delivered for consumption contrary to the prohibitory law of Iowa. Is there any doubt that the decision of the Court in the *Hardin* case would have been to the contrary if the Peoria brewery had been located on the eastern bank of the Mississippi and had laid its pipe under the river to connect with a faucet at the bar of the Iowa representative of the brewing company who had served or undertaken to serve his customers by the glass or "growler"?

When the gas brought in from Pennsylvania in mass reaches the service pipe of the individual householder it is separated from the mass and appropriated to the use of the individual consumer. The pressure in the transporting pipe line is vastly higher than in the distributing mains; it would be wholly impracticable for the householder to use it under the pressure which is necessary to convey it from the wells in Pennsylvania to the Jamestown distributing system. From the point where the pressure is reduced to the burner the whole business of distribution, measurement

and use is local, and from the junction of the private service pipes with the distributing mains the gas is separate and distinct from the mass, and from the gas on its way to other consumers in other service pipes, and never returns to or commingles with the gas in course of transportation.

Plaintiff in error is engaged in performing a public service at the city of Jamestown, the village of Falconer, and the town of Ellicott (p. 16) in all respects indistinguishable from that performed by domestic gas corporations, electrical corporations, water companies, etc., generally. The Pennsylvania Gas Company either produces or buys its gas in the state of Pennsylvania and transports it in its own pipe line to these places, where it distributes it to its consumers. It is no more a common carrier of natural gas than the Uncle Sam Oil Company (*Pipe Line Cases, supra,* 561–562, 575) was a common carrier of oil. It is no more a common carrier in interstate transportation than if it were engaged in manufacturing and distributing gas in Jamestown from coal mined by it in Pennsylvania and received in the usual manner by rail shipments across the state line; or, to approximate more closely, which it received over a privately owned railroad (not a common carrier) in coal cars exclusively employed in its service.

3. The conclusions arrived at by this Court in the *Landon* case and the Kansas Supreme Court in the *Flannelly* case are indeed but applications of the decision of the Court in *Munn* v. *Illinois* [1877] 94 U. S. 113, and the decision of the Court of Appeals of New York in *People v. Budd*

[1889] 117 N. Y. 1, affirmed by this Court in *Budd* v. *New York* [1892] 143 U. S. 517. *Munn* v. *Illinois* dealt with state regulation of interstate commerce, to wit, the elevation and storage of grain substantially all of which was destined for or in actual transportation to other states and much of it to foreign countries. In the minds of counsel who contested the legality of the Illinois statute the interstate commerce feature was deemed the strongest point and advanced first. Waite C.J. in speaking of the contentions of counsel said (p. 123):

'It is claimed that such a law is repugnant:
'1 To that part of section 8, article 1, of the 'Constitution of the United States which con- 'fers upon Congress the power "to regulate 'commerce with foreign nations and among the 'several states";
'2 To that part of section 9 of the same article 'which provides that "No preference shall be 'given by any regulation of commerce or revenue 'to the ports of one state over those of another"; 'and
'3 To that part of Amendment XIV which 'ordains that no state shall "Deprive any person 'of life, liberty or property, without due process 'of law, nor deny to any person within its juris- 'diction the equal protection of the laws."'

After considering and rejecting the last contention the Chief Justice proceeds (p. 135):

'We come now to consider the effect upon this 'statute of the power of Congress to regulate 'commerce.
'It was very properly said in the case of the '*State Tax on Railway Gross Receipts*, 15 Wall. '293, that "It is not everything that affects com- 'merce that amounts to a regulation of it, within 'the meaning of the Constitution." The ware-

'houses of these plaintiffs in error are situated
'and their business carried on exclusively within
'the limits of the state of Illinois. They are used
'as instruments by those engaged in state as well
'as those engaged in interstate commerce, but
'they are no more necessarily a part of commerce
'itself than the dray or the cart by which, but for
'them, grain would be transferred from one rail-
'road station to another. Incidentally they may
'become connected with interstate commerce, but
'not necessarily so. Their regulation is a thing
'of domestic concern and, certainly, until Con-
'gress acts in reference to their interstate rela-
'tions, the state may exercise all the powers of
'government over them, even though in so doing
'it may indirectly operate upon commerce out-
'side its immediate jurisdiction. We do not say
'that a case may not arise in which it will be
'found that a state, under the form of regulating
'its own affairs, has encroached upon the exclu-
'sive domain of Congress in respect to interstate
'commerce, but we do say that, upon the facts as
'they are presented to us in this record, that has
'not been done.'

Munn v. *Illinois* was decided ten years before the enactment of the Act to Regulate Commerce and twenty-nine years before the elevation and storage of grain was included within the jurisdiction of the Interstate Commerce Commission. (Act of Congress approved June 29, 1906.) If the legislation attacked in *Munn* v. *Illinois* had been enacted after the amendment to the Act to Regulate Commerce made in June 1906 undoubtedly the decision would have been the other way. The Illinois statute declared to be valid in *Munn* v. *Illinois* of course was superseded by the amendment to the Act to Regulate Commerce made in 1906.

The New York statute which was before the Court of Appeals in *People* v. *Budd* and before this Court in *Budd* v. *New York* was passed in 1888, the year following the original enactment of the Act to Regulate Commerce, and eighteen years before Congress subjected the elevation and storage of grain to the regulation of the Interstate Commerce Commission. All the grain affected by the statute of 1888 was moved or moving in interstate commerce, and unquestionably the statute of 1888 would have been void if enacted after the amendment to the Act to Regulate Commerce made in 1906. Blatchford J. speaking of the business of elevating grain at Buffalo said (pp. 532–533):

'that about 120,000,000 bushels of grain come 'annually to Buffalo from the West; that the 'business of elevating grain at Buffalo is con- 'nected mainly with lake and canal transporta- 'tion; that the grain received at New York in '1887 by way of the Erie Canal and Hudson 'River, during the season of canal navigation, 'exceeded 46,000,000 bushels, an amount very 'largely in excess of the grain received during 'the same period by rail and by river and coast- 'wise vessels; that the elevation of that grain 'from lake vessels to canal-boats takes place at 'Buffalo, where there are thirty or forty eleva- 'tors, stationary and floating; that a large pro- 'portion of the surplus cereals of the country 'passes through the elevators at Buffalo and 'finds its way through the Erie Canal and Hud- 'son River to the seaboard at New York, whence 'it is distributed to the markets of the world; 'that the business of elevating grain is an inci- 'dent to the business of transportation, the eleva- 'tors being indispensable instrumentalities in the 'business of the common carrier, and in a broad

'sense performing the work of carriers, being 'located upon or adjacent to the waters of the 'state, and transferring the cargoes of grain 'from the lake vessels to the canal-boats, or from 'the canal-boats to the ocean vessels, and thereby 'performing an essential service in transporta-'tion; that by their means the transportation of 'grain by water from the upper lakes to the sea-'board is rendered possible; that the business of 'elevating grain thus has a vital relation to com-'merce in one of its most important aspects; that 'every excessive charge made in the course of the 'transportation of grain is a tax upon commerce; 'that the public has a deep interest that no exor-'bitant charges shall be exacted at any point, 'upon the business of transportation; and that 'whatever impaired the usefulness of the Erie 'Canal as a highway of commerce involved the 'public interest.'

And at pp. 544–545:

'On the testimony in the cases before us the 'business of elevating grain is a business charged 'with a public interest, and those who carry it 'on occupy a relation to the community analo-'gous to that of common carriers. The elevator 'owner, in fact, retains the grain in his custody 'for an appreciable period of time, because he 'receives it into his custody, weighs it, and then 'discharges it, and his employment is thus analo-'gous to that of a warehouseman. In the actual 'state of the business the passage of the grain to 'the city of New York and other places on the 'seaboard would, without the use of elevators, 'be practically impossible. The elevator at Buf-'falo is a link in the chain of transportation to 'the seaboard, and the elevator in the harbor of 'New York is a like link in the transportation 'abroad by sea. The charges made by the eleva-'tor influence the price of grain at the point of 'destination on the seaboard, and that influence 'extends to the prices of grain at the places

'abroad to which it goes. The elevator is devoted 'by its owner, who engages in the business, to a 'use in which the public has an interest, and he 'must submit to be controlled by public legisla- 'tion for the common good. . . .

'So far as the statute in question is a regula- 'tion of commerce, it is a regulation of commerce 'only on the waters of the state of New York. 'It operates only within the limits of that state, 'and is no more obnoxious as a regulation of 'interstate commerce than was the statute of 'Illinois in respect to warehouses, in *Munn* v. '*Illinois*. It is of the same character with navi- 'gation laws in respect to navigation within the 'state, and laws regulating wharfage rates within 'the state, and other kindred laws.'

In *The Minnesota Rate Cases* [1912] 230 U. S. 352, 432, the Court examined the contention of the interstate carriers that the interblending of operations in the conduct of interstate and local business made it necessary that the state should surrender its control over domestic transportation rates. Mr. Justice Hughes, writing for the Court, said (pp. 432–433):

'But these considerations are for the practical 'judgment of Congress in determining the extent 'of the regulation necessary under existing con- 'ditions of transportation to conserve and pro- 'mote the interests of interstate commerce. If 'the situation has become such, by reason of the 'interblending of the interstate and intrastate 'operations of interstate carriers, that adequate 'regulation of their interstate rates cannot be 'maintained without imposing requirements with 'respect to their intrastate rates which substan- 'tially affect the former, it is for Congress to 'determine, within the limits of its constitutional 'authority over interstate commerce and its 'instruments the measure of the regulation it 'should supply. It is the function of this court

' to interpret and apply the law already enacted,
' but not under the guise of construction to pro-
' vide a more comprehensive scheme of regula-
' tion than Congress has decided upon. Nor, in
' the absence of Federal action, may we deny
' effect to the laws of the State enacted within
' the field which it is entitled to occupy until
' its authority is limited through the exertion
' by Congress of its paramount constitutional
' power.'

The same idea recurred in *Vandalia R. R.* v. *Public Service Comm.* [1916] 242 U. S. 255, 258–260, respecting the authority of the Railroad Commission of Indiana to prescribe electric headlights for locomotives in place of the oil headlights commonly in use. The commission's order was made in 1910 (p. 257), but Congress in 1915 (p. 259) passed an act giving the Interstate Commerce Commission powers of inspection and regulation broad enough to include locomotive headlights, and the question before the Court was whether this act operated *ex post facto* to vacate the commission's order and the judgment of the Indiana Supreme Court refusing to set it aside. In other words, the Court held that the Indiana Commission might prescribe electric headlights for all locomotives, whether engaged in interstate or intrastate commerce, until such time as Congress elected to delegate the authority to the Interstate Commerce Commission.

4 *Western Union Tel. Co.* v. *Foster* [1918] 247 U. S. 105, seems to be relied upon to the contrary of the foregoing. The Massachusetts Public Service Commission decided that the Gold and Stock Telegraph Company and the United Telegram Company had without just cause refused to supply one Foster the continuous quotations

of the New York Stock Exchange by means of a ticker service supplied to others, declared the refusal to be an unlawful discrimination, and required the two companies to remove the discrimination. Two suits were instituted, one a statutory petition by the telegraph companies to have the order of the public service commission annulled and the other a bill by the commission to have the same order enforced. The Massachusetts court held that the order of the commission was proper and rendered judgments accordingly. This Court reversed the judgments, holding that the order of the Massachusetts commission was void as beyond the jurisdiction of the state commission under the constitution and acts of Congress.

If the Act to Regulate Commerce had not included telegraph companies as common carriers in 1910 (§ 1 of the Act to Regulate Commerce as amended that year), and subjected their charges to the jurisdiction of the Interstate Commerce Commission (3rd paragraph of § 1, *ibid.*), and forbidden them to discriminate (§ 2, *ibid.*), or to subject any particular person to any undue or unreasonable preference or disadvantage in any respect whatsoever (§ 3, *ibid.*), the case might be considered an authority in support of the contention of plaintiff in error. But it is just as plain that the Act to Regulate Commerce includes the subject-matter of the controversies before the Court in the *Foster* case as it is that the subject-matter of this controversy has been excluded from the jurisdiction of the Interstate Commerce Commission by Act of Congress. Assume that the amendment of 1910 adding telegraphs, telephones

and cables to the jurisdiction of the Interstate Commerce Commission had carried the following clause, " except stock ticker and district fire alarm lines ": what would have been the decision of this Court in the *Foster* case?

POINT II

The Pennsylvania Gas Company is engaged in a public service at Jamestown, Falconer and Ellicott which is subject to the regulation of the State of New York, limited only by the Fourteenth Amendment of the Federal Constitution and the Bill of Rights embodied in the State Constitution.

1 It is significant that the exclusion from the jurisdiction of the Interstate Commerce Commission over common carriers " engaged in the transportation of oil or other commodity . . . by means of pipe lines " (Act to Regulate Commerce, § 1 [line 4]) is of a *group of carriers;* or of a *group of services,* to wit, transportation of water, transportation of artificial gas, transportation of natural gas. It is evident that the distributors and sellers of water and gas to cities and other municipalities and their inhabitants, and the services rendered by such distributors and sellers, are deliberately left where they were before the amendment of 1906 to the Act to Regulate Commerce. Such distributors and sellers are not common carriers anyway; but they are engaged in a public service, and when that service is rendered wholly within the state it is subject to the police power of the state. It may be admitted without detraction from the force of the contention that if Congress shall sometime in the future see fit to regulate the distribution and sale of natural gas which has been transported in

pipe lines across state boundaries it may do so; it is sufficient for the purposes of this case that it has clearly refrained from so doing.

The application here is for a writ of prohibition. Article 4 of the public service commissions law is entitled "Provisions Relating to Gas Corporations and Electrical Corporations; Regulation of Price of Gas and Electricity." Section 64 is —

'§ 64. *Application of article.* This article shall 'apply to the manufacture and furnishing of gas 'for light, heat or power and the furnishing of 'natural gas for light, heat or power, and the 'generation, furnishing and transmission of elec- 'tricity for light, heat or power.'

If the contention of plaintiff in error is sound it must follow that none of the commands of Article 4 addressed directly to gas corporations imposes any duty on the Pennsylvania Gas Company. A domestic gas corporation or a foreign corporation furnishing natural or artificial gas produced from wells located in the state, or from coal imported from Pennsylvania, is obliged by § 65(1) to

'furnish and provide such service, instrumentali- 'ties and facilities as shall be safe and adequate 'and in all respects just and reasonable. All 'charges made or demanded by any such gas 'corporation, electrical corporation or munici- 'pality for gas, electricity or any service ren- 'dered or to be rendered, shall be just and 'reasonable and not more than allowed by law or 'by order of the commission having jurisdiction. 'Every unjust or unreasonable charge made or 'demanded for gas, electricity or any such serv- 'ice, or in connection therewith, or in excess of 'that allowed by law or by the order of the com- 'mission is prohibited.'

None of these obligations is enforceable against plaintiff in error, according to its contention. It claims to be protected by the Federal Constitution in rendering an inadequate service, or in charging therefor whatever the traffic will bear — whatever in the judgment of its managers the traffic will bear. According to it, it and not the State of New York may determine the price of natural gas in Jamestown.

The contention of plaintiff in error in this respect is not supported by any authority except possibly the *Landon* cases reversed by this Court, and is opposed to the underlying principles developed in the *Munn* and *Budd* cases, already considered.

2 The powers of the legislature of the state of New York are plenary, except so far as they are limited by the Federal or State Constitution. (Cullen Ch.J. in *Saratoga Gas Case* [1908] 191 N. Y. 123, 134.) The 40,000 inhabitants of Jamestown (p. 22) look primarily to the State of New York — its courts, its legislature, its administrative tribunals like the public service commission — for the protection which is ordinarily found in the police powers inherent in the state.

Waite C.J. said in *Munn* v. *Illinois* (94 U. S. at p. 125) that —

'it has been customary in England from time 'immemorial, and in this country from its first 'colonization, to regulate ferries, common car-'riers, hackmen, bakers, millers, wharfingers, inn-'keepers, etc., and in so doing to fix a maximum 'of charge to be made for services rendered, 'accommodations furnished, and articles sold.'

Blatchford J. writing for the Supreme Court in *Budd* v. *New York* (143 U. S. at p. 535) quoted

with approval the foregoing language of Chief Justice Waite.

If the legislature of the state of New York should enact a statute fixing the weight and price of bread to be sold in cities containing upward of five million inhabitants it would be binding upon all New York bakers, whether domiciled in New York city or in the state without. (Waite C.J. in *Munn* v. *Illinois*, 94 U. S. at p. 129.) Could a Connecticut baker sell a smaller loaf at a larger price in the city because he made it in Connecticut and brought it with him, or because he shipped it over the New Haven Railroad?

It is conceivable that the New York legislature might enact a statute limiting the price of milk in the city of New York to twenty cents a quart. Could a New Jersey dairyman start a milk route and sell his product in the city at twenty-five cents a quart?

A resident of Pennsylvania may ship gold coin into the state of New York by express, but can he rely upon the interstate commerce clause of the Federal Constitution to protect him in lending it at more than six per cent interest in disregard of the New York statute against usury?

Jamestown is located about five miles from the Pennsylvania line (p. 22). Assume that a Pennsylvania corporation owned and operated a gas plant at Jamestown which manufactured gas from coal mined in and transported in interstate commerce from Pennsylvania. There is no doubt of course that the real estate, fixtures and personal property of such a corporation used in the manufacture and distribution of gas would be a " gas plant " as defined by § 2(10) of the public

service commissions law; nor any doubt that the foreign corporation which owned, operated and managed such a plant would be a " gas corporation " as defined by § 2(11) of the public service commissions law. But the contention of plaintiff in error would be that by removing the *manufacturing* part of its plant over the state line and converting coal into gas in Pennsylvania and sending it thence in pipes to Jamestown for distribution it could sell gas in Jamestown for any price it could get.

Such exemption from regulation is the opportunity of extortion and the identical evil " profiteering ".

With no control in the New York State Public Service Commission over the rates or service of the Pennsylvania Gas Company; with no control over its rates or service in the Public Service Commission of Pennsylvania; and with no control over its rates in the Interstate Commerce Commission on account of the negative provision of § 1 of the Act to Regulate Commerce, the Pennsylvania Gas Company is in a position to extort: at least it asserts here that the State of New York can neither by its legislature, nor its public service commission, nor its courts, prevent extortion, or discrimination, or preference.*

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* Under the contention of plaintiff in error all that any natural gas corporation, domestic or foreign, has to do to escape the regulation of its service charges by the State of New York is to tap the Pennsylvania gas reservior. But New York has natural gas too and a reciprocal arrangement might be entered into between a New York corporation and a Pennsylvania corporation to exchange gas, and thereupon each would pass automatically from the regulation of the commission of its own state and neither would incur the burden of regulation by the Interstate Commerce Commission. Upon the foundation of this reasoning there would be erected in Southwestern New York and Northwestern Pennsylvania a natural gas paradise, where the regulators would cease from troubling and the regulated would be at rest.

The next contention will be that the distribution in Western New York of electricity generated at the Horseshoe Falls in Canada is foreign commerce, and therefore not within the regulatory jurisdiction of the commission.*

POINT III

A Foreign corporation may not engage in a business in New York that is forbidden to a New York corporation; nor may it escape a regulation lawfully prescribed for a New York corporation.

Paul v. *Virginia* [1869] 8 Wall. 168
Horn Silver Mining Co. v. *New York* [1892] 143 U. S. 305, 314–315
General Corporation Law [of New York] §§ 15, 16
German-American Coffee Co. v. *Diehl* [1915] 216 N. Y. 57, 63–64, per Cardozo J.

In *Horn Silver Mining Co.* v. *New York, supra,* Field J. said, " It does not lie in any foreign corporation to complain that it is subjected to the same law with the domestic corporation."

In *German-American Coffee Co.* v. *Diehl, supra,* Cardozo J. said, "As long as a foreign corporation keeps away from this state, it is not for us to say what it may do or not do. But when it comes into this state, and transacts its business here, it must yield obedience to our laws."

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* See appendix to this brief.

POINT IV

A Writ of Prohibition will not lie in anticipation of the action of the Commission if the Commission has jurisdiction of the subject-matter and the only question is that of power to grant the particular relief prayed for.

Matter of Quinby v. *Public Service Comm.* [1918] 223 N. Y. 244, 254

The complaint to the commission was under § 71 of the public service commissions law. The hearing of the complaint and the duty of the commission respecting it are prescribed by § 72.

The Court will not assume in advance that the commission will either violate or ignore the statute, or disregard the interpretations of it by the courts; but if it should do so plaintiff in error would have an adequate remedy under the writ of certiorari. (*N.Y. Code Civ. Pro.* §§ 2120–2148a; *People ex rel. C. P. etc. R. R. Co.* v. *Willcox* [1909] 194 N. Y. 383, per Cullen Ch.J.)

Respectfully submitted

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[November 1919]

APPENDIX

In *Washington Water P. Co.* v. *Montana P. Co.* [1916] P.U.R. 1916E 144, 169–171, the Idaho Public Utilities Commission considered whether or not it was excluded by the commerce clause of the Federal Constitution from jurisdiction over the service and rates of an electrical corporation which received electrical energy at a point of delivery in Montana, brought it across the line between Montana and Idaho at 100,000 volts to a point in Idaho where it was stepped down to 16,500 volts, and in that form distributed it to various transformer stations adjacent to several mines where the current was again stepped down to 2300 volts, in which form it passed to the individual service wires of various mining companies, consumers of the transmitting-distributing company. While of course the administrative decision of a public service commission is not adjudication and therefore not a precedent for the guidance of courts, it is nevertheless submitted with respect that the recent opinion of the Idaho Commission is worthy of the consideration of the Court. The Commission says (p. 169):

'This Commission can see a wide distinction 'between transactions incident to the transmis- 'sion or transportation of a commodity of trade 'and commerce such as electrical energy from 'one state to another state, and transactions inci- 'dent to the distribution or retail delivery of such 'commodity within a state after having been 'transmitted from another state, as to such trans- 'actions being interstate commerce; and can see 'the force of complainant's argument with ref- 'erence to the state's recognized authority to

'prescribe local rules in certain cases affecting 'interstate commerce, until Congress shall act, 'when such argument is applied to the local dis-'tribution of electrical energy which has been 'transmitted from another state.

'It is not disputed by any of the parties to this 'proceeding that the transmission of electrical 'energy from a point in the state of Montana to 'the point of distribution in the state of Idaho is 'interstate commerce; and while the Supreme 'Court of the United States, as far as this Com-'mission is informed, has never decided this par-'ticular question, the Commission assumes that 'such transmission of electrical energy is a trans-'action of interstate commerce, but it does not 'follow therefrom that the distribution of such 'energy within the state of Idaho is a transaction 'of interstate commerce, although the regulation 'of such distribution may affect interstate com-'merce.

'The electrical energy which, after having been 'delivered to the distributor, is being distributed 'in Idaho to the users, has ceased to be an article 'of trade between Montana and Idaho, *regardless 'of whether the distributor is or is not the 'transmitter.** The electrical energy purchased 'in Montana and transmitted in bulk into Idaho 'is a subject of interstate commerce while it 'retains that character. The act of breaking up 'this energy by its owner for the purpose of dis-'tribution is not commerce in and of itself, but the 'sale of the broken up energy or the resale of the 'energy in its original form is commerce, and if 'such sale or resale is wholly within the state of 'Idaho, it is not interstate commerce.

'In the absence of any discrimination against 'electrical energy generated in or transmitted 'from another state, and in the absence of any 'action by Congress indicating that Federal

* Italics ours.

'supervision has been assumed, this Commission 'cannot see how the impartial state regulation of 'the distribution of such energy within the state 'can be repugnant to the provisions of the Fed- 'eral Constitution as affecting interstate com- 'merce in any essential or vital part, or as pre- 'venting or unreasonably burdening interstate 'commerce.

'The local distribution of electrical energy is 'peculiarly a subject of local concern, and is not 'a subject requiring uniformity of regulation as 'between states; and this Commission believes 'that the state has a right to enact reasonable 'laws governing such distribution within its bor- 'ders, in the absence of Federal control. When- 'ever Congress shall act so as to place the mat- 'ter under exclusive Federal control, the state, 'under the provisions of § 79 of the Public Utili- 'ties act, at once surrenders its right to regulate. 'The Commission assumes that Congress has not 'so acted.

'To hold that electrical energy generated in 'Montana or transmitted from Montana can by 'reason of that fact be distributed in Idaho for 'compensation without regulation, while the local 'distribution of electrical energy generated in 'Idaho is subjected to regulation, would be con- 'trary to public policy.'

In April of the present year the West Virginia Public Service Commission had before it the same question (*Re Appalachian Power Co.* P.U.R. 1919D 286). The Appalachian Power Company was a Virginia corporation lawfully engaged in the maintenance of hydro-electric and steam power plants for generating electricity for light, heat and power and supplying the same to the public in both states, and the question which the commission was compelled to decide was whether it had regulative power over the rates of the Vir-

ginia corporation in West Virginia. In its opinion the commission said (pp. 296, 298):

'It is by no means clear that the applicant 'merely by virtue of the fact that power ultimately distributed and sold to its consumers in 'West Virginia is generated in the state of Virginia and transported to its substations in West 'Virginia, to be there transformed, delivered, 'measured, and sold by means of its distributing 'system, to its West Virginia consumers, may be 'regarded as engaged in interstate commerce. '*McCluskey* v. *Marysville & N. R. Co.* 243 U. S. '36.

'We think it may be fairly said that the applicant's commerce, so far as its West Virginia consumers are concerned, begins when its electrical 'energy is transformed into commercial form and 'started on its way to be delivered, measured, and 'sold to its consumers. Or, in other words, that 'the current generated by the applicant is not 'consigned or started upon its journey for delivery to its consumers until it passes through applicant's substations in West Virginia; and if 'this be true, the transaction is wholly intrastate 'and the interstate relation between applicant 'and its consumers does not obtain. However, 'whether this interpretation of the character of 'the applicant's business is justified or not, we 'are of opinion, even though interstate commerce 'may be incidentally affected, the business of applicant being one of local concern only in so far 'as it pertains to its consumers in West Virginia, 'the same is the appropriate subject for state 'regulation. This position is supported by the 'opinion of the Supreme Court of the United 'States in the leading case of the *Minnesota Rate* '*Cases*, 230 U. S. 352. . . .

'So, it seems that by both reason and authority 'the business of the applicant in West Virginia 'should not remain unregulated, and that a rea-

'sonable regard for the public welfare and the 'mandate of the statute creating this commission 'requires that the jurisdiction there given should 'be exercised in order that adequate and suffi- 'cient service may be secured, reasonable rates 'prescribed, and unjust discrimination pre- 'vented.'

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IN THE
SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1919

PENNSYLVANIA GAS COMPANY, *Plaintiff in Error,*

—against—

THE PUBLIC SERVICE COMMISSION, *Second District of the State of New York;* THE CITY OF JAMESTOWN, NEW YORK, *et al., Defendants in Error.*

No. 330

BRIEF FOR THE CITY OF JAMESTOWN, et al., DEFENDANTS IN ERROR.

STATEMENT

This is a writ of error to the Court of Appeals of the State of New York, bringing up for review a judgment of that court (record page 65) which affirms a judgment of the Supreme Court of that state, holding that the Plaintiff in Error was not entitled to a writ of prohibition restraining any further proceedings in a proceeding against the Plaintiff in Error before the Public Service Commission, Second District upon the complaint of Alfred C. Davis and others, seeking a review in the rates charged by the Plaintiff in Error, for gas furnished in the City of Jamestown, New York.

The history and circumstances giving rise to that application are as follows: On May 31, 1917, Alfred C. Davis and others, consumers of gas in Jamestown, New York, filed a petition with the Public Service Commission, Second

District, complaining of an increase in the rate of sale of gas. Such increase had shortly theretofore been made effective by the Plaintiff in Error, Pennsylvania Gas Company. On June 4, 1917, the Public Service Commission ordered that the Pennsylvania Gas Company either satisfy such complaint or answer. Thereupon and under date of June 23, 1917, the Plaintiff in Error filed a written demurrer to such complaint putting in issue the jurisdiction of the Public Service Commission over the subject matter involved in said complaint and over the Plaintiff in Error.

Later upon stipulation and order, the City of Jamestown, as such, was admitted as a party to the proceedings. The entire matter was then submitted to the Commission upon briefs and oral argument. Such submission was under date of August 23, 1917, and resulted in a decision of the Commission overruling the demurrer. Under date of September 19, 1919, the gas company made formal application for a re-hearing which was denied by the Commission September 27th.

Immediately the Plaintiff in Error made application for a writ of certiorari to review such determination and such writ was granted, returnable before the Appellate Division, Third Department. Upon the return of such writ of certiorari, such writ was dismissed as having been prematurely invoked (see opinion, *People ex rel Pennsylvania Gas Company vs. Public Service Commission,* 181 A. D. 147.)

On January 25, 1918, application for a writ of prohibition was noticed by the service of a petition and notice of application upon the attorneys for the Defendant in Error.

Hearing was had upon such application on February 2, 1918, before Hon. Gilbert D. B. Hasbrouck, at a Special Term of the Supreme Court held at the Court House in the City of Kingston, New York. Following such hearing, and on March 8, 1918, an order was made allowing an alternative writ of prohibition which required the Defendants

in Error to show cause at said Court on April 6, 1918, why such writ should not be made absolute. (In re Application Pennsylvania Gas Company 103 Misc. 37.)

Appeal was taken to the Appellate Division of the Third Department from said order and upon such appeal such order was reversed with an Opinion by said court written by Mr. Justice Lyon (In re Application Pennsylvania Gas Company 184 A. D. 556.) Upon further appeal by the Plaintiff in Error to the Court of Appeals of the State of New York, the decision of the Appellate Division was affirmed. (Pennsylvania Gas Company vs. Public Service Commission, 225 N. Y. 397).

A writ of error was then sued out by the Plaintiff in Error to the Supreme Court of the United States.

THE FEDERAL QUESTION

The question presented for review is whether under the Public Service Commissions Law of the State of New York (Laws of 1910 Ch. 480; Consolidated Laws of New York Ch. 48), the Public Service Commission, Second District of New York, has power and jurisdiction to control the rates of the Plaintiff in Error, Pennsylvania Gas Company, for natural gas produced by said company in the State of Pennsylvania and transported in pipes and then distributed and sold by it to consumers in the City of Jamestown, in the State of New York.

The facts are as follows: The Pennsylvania Gas Company is a corporation organized and existing under the laws of the State of Pennsylvania and engaged principally in the business of producing, transporting and marketing natural gas. The source of supply of such natural gas to such Pennsylvania Gas Company is wholly within the State of Pennsylvania. The Gas Company markets its natural gas product in part at least, within the State of New York, and among other places so served is the City of Jamestown.

Within that city the sole supply of natural gas to consumers is furnished by this company.

Jamestown is a city of approximately forty thousand inhabitants and is located in the southwesterly portion of the County of Chautauqua, State of New York, within approximately five miles of the boundary line between the States of Pennsylvania and New York.

Shortly before May 15, 1917, the Pennsylvania Gas Company filed with the Public Service Commission a new schedule of tariffs to become operative May 15, 1917. Such schedule so filed, increased the charge to consumers within the said City of Jamestown, sixteen and two-thirds per cent.

On May 31, 1917, Alfred C. Davis and others filed a complaint with the Public Service Commission complaining that since the organization of said Pennsylvania Gas Company and its commencement of supply of natural gas to consumers within the said City of Jamestown, that the returns to said company from their said consumers had been sufficient to aggregate many thousands of dollars annually, over and above the interest at legal rates, upon moneys invested; and that the said Pennsylvania Gas Company had upon many occasions increased its capital stock and distributed such increase among its stockholders in the form of stock dividends until its capital stock had increased to several times its original issue and all without further investment of moneys by its stockholders; that since its organization the Pennsylvania Gas Company had at all times and was at present paying to its stockholders cash dividends of at least ten per cent per annum upon the capital stock outstanding and that for a long term of years said gas company had paid to its stockholders large and excessive returns over and above a reasonable return upon capital actually invested, and over and above reasonable reservations for surplus and contingencies, and that all such payments and returns to stockholders had been made out of moneys

paid by the consumers for such natural gas prior to the attempt to increase the charges on May 15, 1917.

That the former charge to consumers in the City of Jamestown, was exorbitant, and that the said increase was unjust, excessive and wholly unnecessary and that such increase would result in great hardship to the consumers, customers and patrons of the said gas company within the city of Jamestown.

ARGUMENT

POINT I

A Writ of Prohibition does not lie in this case, in as much as there are other legal remedies, by Appeal or otherwise, for testing the jurisdiction of the Commission. In the proceeding before the Commission, full review of that question is permissible by Certiorari, following Final Decision upon the merits. Prohibition is never available, if other means for review exist.

Prohibition is one of the few Writs still known to our practice. It is a most extraordinary remedy, and can be invoked only upon jurisdictional questions, and can never be made a means of review:

Re New York and Porto Rico Steamship Co., 155 U. S. 524.
In Re Cooper, 143 U. S. 495.
Smith vs. Whitney, 116 U. S. 174.
In Re Rice, 155 U. S. 403.
City R. R. Co. vs. Cit. St. R. R. Co., 116 U. S. 563.

POINT II

The state statute expressly confers jurisdictio upon the Public Service Commission to regulat the selling price of natural gas sold within th State of New York.

By Section 71 of the Public Service Commissions Law of the State of New York, provision is made for the pre senting of complaints relative to prices charged by a supply ing gas corporation, and by Section 72, it is provided:

> "After a hearing and after such investigation * * the Commission, within lawful limits may, by orde fix the maximum price of gas or electricity * * * t be charged by such corporation or person * * * * *

It will be observed that this statute makes no distinctio in its terms between foreign and domestic corporations, no as to the source of supply. It declares generally such au thority in the Commission over persons and corporation "authorized to manufacture and sell the supply of gas o electricty." So far as we can discover, question has neve before been made as to the application of this statute t foreign corporations doing business within the state.

Upon this question, Justice Hasbrouck, at page 44 of th record concedes the scope of the state legislation and says

> "This power of the state has no limitation except i should be uniform and not confiscatory and not offen sive to the Interstate Commerce clause of the Consti tution."

The Court of Appeals has expressly held that the statut conferred jurisdiction upon the Commission. That cour in Pennsylvania Gas Company vs. Public Service Commis sion, 225 N. Y. 397, said in referring to the Public Servic Commissions Law:

"The state in the adoption of this law has not imposed a new burden. It has not created a new duty. It has given a new "sanction" to "an inherent duty." (W. U. Tel. Co. v. Commercial Milling Co., 218 U. S. 406, 416). It has established a new administrative agency the better to ascertain and declare and enforce a duty already existing. We cannot doubt that the creation of such an agency is within the power of the state until Congress shall manifest the purpose to override its action."

POINT III

The related powers of the Federal and State governments over questions of this character.

Under the Confederacy, preceding the adoption of the Constitution, chaotic conditions having ensued because of divers commerce regulations between the several states and citizens thereof, there was inserted in the Constitution of the United States, in subdivision 3 of Section 8 of Article 1, express declaration of the power of Congress, "to regulate commerce with foreign nations and among the several states and with the Indian tribes."

Pursuant to this power, Congress has adopted various statutory enactments generally referred to as the Interstate Commerce Acts. These enactments, however, relate almost entirely to transportation and from them, by express provision, are excepted, those persons and corporations engaged in the transportation of natural or artificial gas.

There is, then, no express statutory enactment by Congress touching the situation here presented. It may be that Congress has power to so enact under the above quoted provision of the Federal Constitution. It has not yet exercised that power.

It is, of course, true that transportation of gas, like that of any other commodity, from one state to another, is interstate commerce.

By the statutes, referred to under the preceding point, the State has attempted to delegate to this Commission, the power to fix these rates, and we have, squarely presented, question of the right of the State to so regulate these matters, in the absence of legislation by the Federal government.

Questions of this character have been before the courts for years.

In Gibbons vs. Ogden, 9 Wheat. 196, the power of Congress in interstate commerce matters was declared to be supreme and complete in itself, and that it had no other limitation than that fixed by the Constitution.

Early, however, it was recognized that, although the power of Congress to act was broad and practically unlimited, yet that there were numerous situations which must, of necessity, be regulated in some manner, and in those instances where Congress had not seen fit to exercise the power conferred upon it, by the Constitution, the States were permitted to assume regulation of those matters.

Thus, in Oil Mfg. Co. vs. Board of Agriculture, 222 U. S. 380, it was held that a state statute subjecting kerosene and other illuminating oils offered for sale in the State of North Carolina, to an inspection, for the purpose of determining their safety and value for illuminating purposes, and fixing a charge of half a cent a gallon for such inspection, was appropriate state legislation, and not an invasion of the province of Congress, Congress having failed to legislate in that particular.

It has also been held that the various states are entitled to protect their coasts, improve their harbors and streams, and to construct dams and bridges in navigable streams. within their limits, unless such action is in direct conflict with statutory enactments of Congress.

Wilson vs. Blackbird Car, Etc. Co., 2 Pet. 245.
Gilman vs. Philadelphia, 3 Wall. 713.
Pound vs. Turck, 95 U. S. 459.

The States may also, in connection with improvements, make a wharfage charge for the use of wharves and piers, although such are directly used in connection with interstate commerce, Congress having failed to act in that connection. Keokuk Etc. Co. vs. Keokuk, 95 U. S. 80.

These and numerous similar cases having continually been presented to our courts, the Supreme Court of the United States, in an exhaustive opinion by Justice Hughes in the Minnesota Rate Case (Simpson vs. Shepard, 230 U. S. 352, 57 L. Ed. 1511), reviewed all of these decisions and definitely and clearly indicated the provinces of both the Federal and State governments in matters relating to interstate commerce, where Congress had not seen fit to adopt any statutory enactments appropriate to the determination of such questions.

It was there held that the states could not impose direct burdens upon interstate commerce, and could not prohibit interstate trade in legitimate articles of commerce and after reviewing numerous decisions in that connection, the court there said:

> "But within these limitations there necessarily remains to the states until Congress acts, a wide range for the permissible exercise of power appropriate to their territorial jurisdiction, although interstate com-

merce may be affected. It extends to those matters of a local nature as to which it is impossible to derive from the constitutional grant an intention that they should go uncontrolled pending Federal intervention. Thus, there are certain subjects having the most obvious and direct relation to interstate commerce, which, nevertheless, with the acquiescence of Congress, have been controlled by state legislation from the foundation of the government, because of the necessity that they should not remain unregulated, and that their regulation should be adopted to varying local exigencies; hence, the absence of regulation by Congress in such matters has not imported that there should be no restriction, but rather that the states should continue to supply the needed rules until Congress should decide to supersede them. Further, it is competent for a state to govern its internal commerce, to provide local improvements, to create and regulate local facilities, to adopt protective measures of a reasonable character in the interest of the health, safety, morals, and welfare of its people, although interstate commerce may incidentally or indirectly be involved. Our system of government is a practical adjustment by which the national authority as conferred by the Constitution is maintained in its full scope, without unnecessary loss of local efficiency. Where the subject is peculiarly one of local concerns, and from its nature belongs to the class with which the state appropriately deals in making reasonable provision for local needs, it cannot be regarded as left to the unrestrained will of individuals because Congress has not acted, although it may have such relation to interstate commerce as to be within the reach of the Federal power. In such case, Congress must be the judge of the necessity of Federal action.

> Its paramount authority always enables it to intervene at its discretion for the complete and effective government of that which has been committed to its care, and, for this purpose and to this extent, in response to a conviction of national need, to displace local laws by substituting laws of its own. The successful working of our constitutional system has thus been made possible."

The Minnesota Rate Case presented a question of the validity of a statute seeking to confer upon a Utilities Commission regulative control over intrastate business handled by a carrier engaged in both intrastate and interstate business. It was urged that regulation in the manner sought, of the intrastate business necessarily had an effect upon, and did interfere with the conduct of the interstate business conducted by the same carrier. This case presents fuliy the confines of the decisions pro and con upon this question. Hence it is cited by most of the recent decisions as authority for the one contention or the other.

Its conclusion, however, makes it clear that it supports the contention of the respondents in the case at bar.

In reading it, it should be borne in mind that a railroad company sells nothing except transportation for persons or property. It does not sell a commodity. Hence, regulation in railroad cases becomes direct regulation of interstate transportation.

In *Missouri K. & T. R. Co., vs. Harris,* 234 U. S., 412, 58 L. Ed. 1378, the rule was enunciated that a state law, enacted under any of the reserved powers—especially if under the police power—is not to be set aside as inconsistent with an Act of Congress regulating commerce, unless there is actual repugnancy, or unless Congress has at least mani-

fested a purpose to exercise its paramount authority over the subject.

In *Vandalia Railroad Company vs. Public Service Commission,* 242, U. S., 255, 61 L. Ed. 276, the court approved an Act requiring uniform equipment of headlights upon all trains operated within its confines, as ordered by the Commission, holding that inasmuch as Congress had not acted in the matter, there was no unconstitutional interference with Interstate Commerce.

As further illustrating the lengths to which the state may go in their regulation of interstate facilities engaged in interstate commerce as well as intrastate business, we call attention to the *Western Union Telegraph Company vs. City of Richmond,* 178 Fed. Rep. 310, Affirmed 249, U. S. 233. The Western Union Telegraph Company was incorporated under the general provisions of the Post Roads Law of the United States. That Act gives to telegraph companies complying with its requirements, the right to use public streets, highways and alleys without any consent of state or municipal authorities. The telegraph company was engaged in interstate commerce and was operating under such Act. Its line extended through the city of Richmond. That city by its ordinance, sought to control the size, number and location of the poles in the street, and to compel the right to attach its fire alarm wires to such poles and even to require underground conduits. It sought to enforce a payment of two dollars per year per pole for street purposes. The right to make such exactions was clearly held in that case, and determined to be not in conflict with the commerce clause of the Constitution.

As indicating the announced tendency of the court, we call attention to the decision in Illinois Central Railroad

Company vs. Public Utilities Commission, decided January 14, 1918, wherein, construing a statute, claimed to conflict with the constitutional provision, the court said:

> "In construing Federal statutes enacted under the power conferred by the commerce clause of the Constitution, the rule is that it should never be held that Congress intends to supercede or suspend the exercise of the reserved powers of a state, even where that may be done, unless, and except so far as its purpose to do so is clearly manifested."

It will be observed that in its precise wording, the above quoted provision of the Federal Constitution, merely confers a power upon Congress. It does not purport to take like or similar powers from the states.

The above cases and many others to a like effect evidence a construction which preserves to the state the regulation of such incidental matters relating to interstate commerce, as have not been actually taken over to Congress. That is, until Congress acts, the State is free so to do.

This conception accords fully with the general doctrines enunciated by Mr. Justice Hughes in the Minnesota rate case and has been followed throughout the various decisions.

The case of *Western Union Telegraph Co. vs. Foster,* 38 S. Ct. 438, is clearly to be distinguished from this case in principle. In the Foster case, the bringing of market quotations from New York to Boston was preceded with a definite contract for the sale thereof. The quotations were sent to fill that contract.

In the case at bar, there is no definite contract for the sale of this commodity. It is brought from Pennsylvania,

turned into a system of distributing pipes, and there awaits sale, not at the volition of the Company, but at the volition of the consumer. The consumer is not required by contract or otherwise to use any of it. He may use it as freely as he will, and the contractual status of purchaser and seller only arises upon the commencement of such use.

The distinction in principle is, that in the one case commodities were brought in, in fulfillment of a previously made contract. In the other case, the gas is brought into the state for sale to those who may thereafter wish to purchase it. It is expected of course that sale of the gas will be had within New York State. However, there is no certainty as to when the sale will take place, or to whom it will be made. Except as its characteristics require, the importation and sale of this gas does not differ from the bringing into the state of a carload of cattle for sale generally to whoever may wish a portion thereof.

POINT IV

Regulation of the selling price of natural gas piped from one state to another is not of a character requiring uniform national legislation and hence is not within that class of cases where the states are prohibited from legislation, even though Congress has not acted.

There are certain classes of questions so national in their character that uniform national regulation is obviously essential, and in such instances, the states may not assume control of such matters, even though Congress has not acted.

This case, however, does not fall within that category. It is only within very narrow and restricted areas that na-

tural gas is produced at all. The large majority of the country is necessarily without it. The one company may have its source of supply close to its market, and be able to produce this commodity and deliver it to its consumers at much less than some other concern in a different locality. The sale of natural gas is essentially local in its character, as distinguished from national.

Such was the holding of the Supreme Court of Indiana in *Jamieson vs. Ind. Natural Gas and Oil Co.,* 128 Ind., 555, where the court said:

> "Upon this point, we affirm that natural gas is characteristically and peculiarly a local product; that its production is confined to a limited territory; that because of its local characteristics and its pecularities, it is a proper subject for state legislation, and cannot, so far as regards local production, be made the subject of general legislation by Congress; or, at all events, it does not require a uniform system as between the state, for its regulation."

And, in State ex rel Caster, et al vs. Flannelly, Kansas Supreme Court reported in Public Utilities Reports, Annot. 196 c. at page 810, it was said:

> "Granting for the moment that the sale of natural gas under the circumstances disclosed, is interstate commerce, it is not national in its character, it admits of no one uniform system of regulation, and it is not that kind of interstate commerce which requires exclusive legislation by Congress."

The Court of Appeals in its opinion, Page 51 of the Record said:

"The question remains whether, in default of action by Congress, the attempted regulation is within the police power of the state.

"The petitioner is a public service corporation. Its rates are subject to regulation by some agency of government. Congress has never occupied the field of regulation, as it has done with railroads, the telegraph and telephone lines, and even the oil companies (Act to Regulate Commerce, as amended June 29, 1906, ch. 3591, and June 18, 1910, ch. 309). Gas and water companies are expressly excepted. In such circumstances, there is no implied exclusion of the police power of the states. The exercise of that power is, indeed, subject to conditions. It must not impose upon interstate commerce burdens new and direct rather than remote and incidental (Leisy v. Hardin, supra; Minnesota Rate Cases, 230 U. S. 352, 396, 400). It must not discriminate against foreign products (Brimmer v. Rebman, 138 U. S. 78; Minn. Rate Cases, supra, at p. 401). It must not introduce diversity and conflict where there is need of uniformity and harmony (Cooley v. Board of Wardens, 12 How. (U. S.) 299, 319; Wabash, St. L. & P. R. Co. v. Ill., 118 U. S. 557; Covington & C. Bridge Co. v. Kentucky, 154 U. S. 204; Minn. Rate Cases, supra, at page 400) But subject to those conditions, the police power of the states survives, though the transactions brought within its grip are those of interstate commerce. Matters peculiarly of local concern are not "left to the unrestrained will of individuals because Congress has not acted" (Minn. Rate Cases, supra, at p. 402). "Our system of government is a practical adjustment by which the national authority as conferred by the Con-

stitution is maintained in its full scope without unnecessary loss of local efficiency" (Minn. Rate Cases, supra). No general formula can tell us in advance where the line is to be drawn. "We have no second Laplace, and we never shall have, with his Mechanique Politique, able to define and describe the orbit of each sphere in our political system with such exact mathematical precision." (Daniel Webster in Bank of Augusta v. Earle, 13 Pet. 519, 559, quoted by Henderson, "The Position of Foreign Corporations in American Constitutional Law," p. 117).

POINT V

The delivery and sale of natural gas, after transportation from one state to another, is not interstate commerce.

The Defendants in Error understand that the Pennsylvania Gas Company places reliance upon that portion of the Court of Appeals opinion wherein the conclusion was reached that the local sale was a part of the interstate commerce. That court at page 51 of the record said:

> "There is no break in the continuity of the transmission from pumping station in Pennsylvania to home and office and factory in Jamestown. A different question would arise if gas transmitted from Pennsylvania should be stored in reservoirs in New York, and then distributed to consumers as their needs might afterwards develop. The quantity stored or the period of storage might require us to hold that interstate commerce was at an end when the place of storage has been reached. (Kehrer vs. Stewart, 197 U. S. 60, 65; Brown vs. Houston, 114 U. S. 622). The transactions would then be similar to those common in the

> oil business. We do not now determine the rule that should govern them. It is enough to hold that where there is in substance no storage, but merely transmission for immediate or practically immediate use, direct from seller to consumer, interstate commerce does not end until the gas has reached its goal. That, by the fair intendment of the petition, is the business conducted by this petitioner. It is not important that consumers do not signify in advance the precise amount that they will need. If their wants are approximately known, and the gas is transmitted not to be held, but to be used, so that any storage that results is merely casual and incidental, the transaction is to be treated as single and continuous. We must then say in the language of Holmes, J., in W. U. Tel. Co. vs. Foster, supra, that the transmission is "as continuous and rapid as science can make it."

In other words, the gas must be stored in reservoirs before interstate commerce ends.

This reasoning by the court does not seem to be the logical deduction to be drawn from the facts. It is obvious, that the act of bringing gas into the city is interstate commerce in the sense that it is bringing a commodity from one state to another. But, after its destination has been reached other problems arise, its transportation has ceased, the delivery and sale to consumers commences. Such sale is to those who may wish to use it in such quantities and at such times as they may desire.

The gas comes to the city of Jamestown through the company's main pipe lines. Its distribution and sale must necessarily be made through the system of local lines extending throughout the city. The overflow from the main

lines into the local system according to the pressure furnishes for all practical purposes a storage of the gas. The consumers may purchase of such gas, little or much or none at all. That which is unused awaits further consumption.

The delivery and sale of the gas to customers is made at the burner tips and can not be said to be a part of the continuous movement of the gas from the State of Pensylvania to consumers in Jamestown.

The reasons given by the court for such a finding are a departure from the well known views expressed by other courts. In State ex rel Caster vs. Flannelly, supra, it was expressly said:

> "It is a matter of common knowledge that service pipes from the pipe lines of distributing companies to private residences and other buildings belong to the owner of the property served, and installation was made at their expense."

Mr. Justice McReynolds in delivering the opinion in this court in Public Utilities Commission for the State of Kansas et al., vs. Landon, 249 U. S. page 236 said:

> "But in no sense can it be said under the facts here disclosed, that sale and delivery of gas to their customers at burner tips by the local companies operating under special franchises constitute any part of interstate commerce. * * * * * * * * * * "

If the "original package rule" can be applied to delivery and sale of natural gas then under that rule the sale of gas within the state, after its transportation is completed, is not interstate commerce. This question was squarely presented in State ex rel vs. Flannelly, supra. In that instance, the Public Service Commission of the State of Kansas had

made an order regulating the selling price of gas furnished by the receiver of the gas company which procured a part at least of its supply outside the state. The receivers sought to restrain enforcement of the order upon the ground that they were engaged in interstate commerce and that the selling of such gas was a portion of such commerce. That court held that the selling of the gas after its transportation was not a part of interstate commerce and reached that result from the application of the so-called "original package rule" and in its discussion took occasion to say:

> "Our question is, when does the natural gas that is sold by the receivers in the several cities in this state, cease to be an article of interstate commerce."
>
> In 7 Enc. U. S. Sup. Ct. Rep. 298, we find a clear and condensed statement of the rules to be deduced from the decisions of the United States Supreme Court, as follows:
>
> "The general rule is, that as long as an article imported remains in the hands of the importer in the original and unbroken package in which it was imported, it is protected by the commerce clause of the Constitution from the interference of state laws, and that it is only when the package has been sold by the importer or has been broken up by him, or has otherwise become mixed with the common mass of property in the state, that it becomes subject to state legislation."
>
> "The original package rules will be of some assistance in determining whether or not the receivers' sale of gas in this state is interstate commerce. The original package of gas is broken when the first gas is taken out of the pipe lines and sold in this state. Therefore the gas ceases to be an article of interstate

commerce. The gas when sold had become mixed with the common mass of the property in this state by being so commingled with the gas produced here as to completely lose its identity. * * * * * * * * * "

"If the analogy of original packages or importation of property in bulk applies to gas in the mains, it ceases to apply when thousands of service pipes are filled with gas to be drawn off at such times and in such quantities as the individual consumer desires. Interstate commerce is at an end when the bulk of the imported gas is broken up for indiscriminate distribution to individual purchasers at retail sale. The gas then becomes mixed with the common mass of the property in the state. To exclude the power of the state from control over an article imported into it, it is necessary that the article be capable of being pointed out and identified, and the owner be able to say: 'This came from another state, and has not yet become commingled with the mass of property in this state so as to make it a part of that property.' "

The leading authority upon the so-called "original package rule" is Company vs. Hardin, 135 U. S. 128. That case, when compared to the one at bar, upon the facts, is a strong authority to the effect that the sale of this gas as it is sold, is no part of interstate commerce.

In the Hardin case it was held that a manufacturer of beer, had a right to import it into a dry state, and there sell it in the original package. It is obvious that the same keg of beer so imported and sold by the glass, would not be within that protection.

POINT VI

State regulation of the selling price of gas piped in from another state is not a regulation of interstate commerce. It infringes no province of Congress. Is not a restriction upon interstate commerce in any sense and is an appropriate exercise of a purely state function.

The leading authority upon this question is Manufactures Light and Heat Co. vs. Ott, 215 Fed. 940. In that case, the Public Service Commission of the State of West Virginia, sought by order to regulate the price of gas charged to consumers within the state. Portions of that gas, at least, came from the State of Pennsylvania and Ohio, and it was insisted that the Commission had no authority by reason of the fact that the corporations affected were engaged in interstate commerce.

In discussing that question, that court said:

> "We are unable to agree that the fixing of the rates to be charged by complainants to their customers in West Virginia, is an unlawful regulation of interstate commerce. The regulation of companies engaged in the transportation of gas is expressly excluded from the scope of the interstate statute. Neither the West Virginia statute nor the orders of the Commission purport to interfere in any manner with the transportation of natural gas from West Virginia to other states. Nothing is attempted except the regulation of the prices of natural gas to the citizens of West Virginia under state authority. The action of these corporations in uniting their operations with those of like corporations of Ohio and Pennsylvania in pumping gas into a common system of pipes supplying customers

in the three states, may produce the result that some gas from Ohio and Pennsylvania comes into West Virginia, although it is undisputed that a much larger quantity of gas goes out of West Virginia into Ohio and Pennsylvania than can possibly come in from these states. But this overflow of gas from one state to another, according to the pressure from the main gas pipes as common reservoirs, cannot effect the power of the state of West Virginia to make reasonable regulations as to rates for gas furnished to its own citizens. West vs. Kansas Gas Co. 221, U. S. 229, 31 Sup. Ct., 564, 55 L. Ed. 716, 34. L. R. A. (N. S.) 1193, relied on by complainants, has no application, for in the present case no effort is made to prevent the transportation and sale of natural gas from West Virginia into other states. It is not necessary to decide whether the Congress may not regulate charges for natural gas under such conditions, and under the well known rule the court should not anticipate that question. In the present state of the law, the Congress having taken no action, it was clearly within the power of the state legislature to provide for the protection of its own citizens against excessive charges. If it be assumed that interstate commerce will be incidentally affected, yet the regulation of the local charges of a natural gas company as a public service corporation is within the police power of the state until the Congress sees fit to act. The recent and full review of the subject by the Supreme Court in the Minnesota Rate Cases, Simpson vs. Shepard, 230 U. S. 352, 33 Sup. Ct. 729, 57 L. Ed. 1511, 48 L. R. A. (N. S.), 1151, leaves no room for discussion. The statute falls clearly within the principles there laid down by the court after setting out the limitations on state action."

A like view was expressed by the Court of Appeals in this case on page 54 of the Record. That court said:

> "We deal here with a different situation. There is here no regulation of transportation (Mfrs'. Light & Heat Co. v. Ott, 215 Fed. Rep. 940, 944). There is no regulation of a duty owing equally to two states. There is regulation of a duty owing to one of them alone. The seller of most things has the right to sell at whatever price he will. This petitioner has lost that right by the acceptance of a public franchise in consideration of a public service (Gibbs v. Baltimore Gas Co. supra.; New Orleans Gas Co. v. Louisiana Light Co. 115 U. S. 650; Shepard v. Milwaukee Gas Co., 6 Wis. 639). The service is due to the state from which the privilege proceeds. Until Congress shall intervene, it is, therefore, the police power of New York that controls the sale of gas to consumers in New York. There is no division of the power between New York and Pennsylvania There is no more a division of power than when we regulate our fees for wharfage or our tolls for artificial waterways. In these matters, protection of our own inhabitants is a duty that is ours and no one else's. The power may be displaced; but until displaced, it is undivided. Here, then, is the decisive distinction between the regulation of the price of gas and that of rates of transportation. There is no room for conflict of authority, for clashing regulations. The statute has a sphere of operation that is not national, but local (Cooley v. Bd. of Port Wardens, supra.) It is idle to speak of the need of uniformity of action by states of equal competence when there is only one state whose action is involved But even within the state, diversity rather than uniformity is

exacted by the conditions of the business. Rates adequate in one city are inadequate in another. The local needs are best known to local agencies of government. No central authority, acting for the nation as a whole, will readily discern them.

"The case comes, then, to this: We have a sale of a single commodity. We have a pre-existing duty to sell it at fair rates. We have a transaction where conflicting regulations by the states are impossible, for the public duties regulated are fulfilled in one state only. We have a statute which declares a duty that would exist without it, and establishes a new agency of government to insure obedience. The silence of Congress cannot be interpreted as a declaration that public service corporations, serving the needs of the locality, may charge anything they please (County of Mobile v. Kimball, supra; Transportation Co. v. Parkersburg, supra; Covington Bridge Case, supra p. 222). The local regulation stands until Congress occupies the field.

POINT VII

The logical result of appellant's argument, that the mere fact that the source of supply is outside the state brands the entire transaction as one of interstate commerce would be to remove all restraint upon those companies so situated geographically as to permit the obtaining of a part or all of the supply from without the state.

Analysis shows that the single fact in the present case, differentiating this company from those concededly under state control, is the location of the source of supply. It happens that in this instance that supply is within the State

of Pennsylvania. The gas is brought to Jamestown, and there sold, as called for. The business is transacted in the usual way that a gas business is carried on. It cannot be possible that the mere incident of the source of supply being without the state, subjects this helpless community to the unrestrained avarice of this public service corporation.

If it did, then a concern situated as is the Consolidated Gas Coompany of New York City, could well afford to move its plant from Long Island to Jersey City. It could as well pipe its gas across the Hudson as across the East River. It would then be in precisely the same situation as is the appellant. Even the great expense of such removal would soon be repaid, if the Consolidated Gas Company could then charge for its product such sums as it saw fit, without restraint by state authority.

In a like situation would be the electrical concerns along the Saint Lawrence and the Niagara Rivers. In fact along each border of the state would exist a geographical zone in which companies might operate, with complete immunity from all regulations.

Such a chaotic condition was never intended.

These situations clearly fall within the class of cases indicated by Justice Hughes in the Minnesota Rate Case, where he says:

> "Thus, there are certain subjects having the most obvious and direct relation to interstate commerce, which, nevertheless, with the acquiescence of Congress, have been controlled by state regulation from the foundation of the government, because of the late necessity that they should not remain unregulated, and that their regulation should be adapted to varying local exigencies,, hence the absence of regulation by Congress in

such matters has not implied that there should be no restriction, but rather that the states should continue to supply the needed rules until Congress should decide to supercede them."

POINT VIII

The case of Public Utilities Commission for the state of Kansas et al vs. Landon as Receiver, 249 U. S. 236, is decisive of the state's right to fix and determine the proper rate charged for gas sold to its inhabitants.

A brief recital of facts in the Landon litigation shows a somewhat dissimilar situation existing but an application of the principles hereinbefore indicated.

All of this litigation arose from the effort of the Public Service Commissions of the States of Kansas and Missouri to determine and fix the rates for gas sold within those states. There the same claim was made as in the case at bar, i. e. that the business of the gas company was interstate commerce and that the Commission had no jurisdiction over them. The decisions of the lower courts are found in 234 Fed. 152; 242 Fed. 682, and 245 Fed. 950.

The gas in those cases was produced in the states of Oklahoma and Kansas. The Oklahoma gas was piped into Kansas where prior to sale the gas produced in Kansas was added. Kansas City and other communities in Kansas were then served and the pipe lines continued into Missouri, where additional consumers were supplied. The Kansas Natural Gas Company of which Landon was receiver, owned the trunk lines and the gas, but the gas sold in Kansas was delivered to consumers through intermediate local distributing companies on a percentage basis. The gas was

consumed at the burner tips as fast as it passed through the meters of the individual consumers.

It appears that the gas supplied was transported for a long distance and that because of that fact one of the largest elements of operating expense was transportation charges. It further appears that in its decision the Public Service Commission then acting, attempted to make an analysis of the operating expenses and in connection therewith fixed a transportation charge which it took into account in fixing the selling price of the gas. The ultimate conclusion reached was that the selling price fixed upon that basis and that the figure there adopted under the facts in that case was a confiscatory charge necessarily involving a regulation of the transportation charges. Obviously if that conclusion of fact is correct, then there was an attempt to regulate interstate commerce.

The first Landon case was brought to restrain the Kansas Commission from enforcing a rate fixed by it. The Kansas State Court in People ex rel Caster vs. Flannelly, 96 Kans. 372, upheld the jurisdiction of the State Commission. The United States Circuit Court granted a preliminary injunction. (234 Federal 152). The case then came before Judge Booth. The opinions in both the Landon as Receiver vs. Public Utilities Commission of Kansas 242 Federal, 682, and in the companion case of Landon as Receiver vs. Missouri Commission 245 Fed. 950, were written by him. In the Kansas case (242 Federal 682) the court disregards the admixture of the local Kansas gas holding under the authorities that it did not change the interstate character of the business; that the delivery and sale, even through distributing companies, is a part of the interstate business and protected commerce and that the State of Kansas could not fix the rate of selling price of the gas.

Subsequently Judge Booth granted an injunction against the Missouri Commission 245 Fed. 950, on the ground that the Missouri Commission had not fixed rates but merely suspended schedules and threatened action. In his opinion Judge Booth reaffirmed his previous conclusion on the question of jurisdiction.

Upon final appeal to the United States Supreme Court (249 U. S. 236), the decrees of the lower courts in each instance were reversed.

The Supreme Court holds distinctly that the Commissions of the respective states of Missouri and Kansas had jurisdiction to fix the rates for the sale of such gas. The court in its opinion said:

> "We think the trial court properly overruled the objections offered to its jurisdiction and nothing need be added to the reasons which it gave. 234 Fed 152, 155. But we cannot agree with its conclusions that local companies in distributing and selling gas to their customers acted as mere agents, immediate representatives or instrumentalities of the receivers and as such carried on without interruption interstate commerce set in motion by them.
>
> "That the transportation of gas through pipe lines from one state to another is interstate commerce may not be doubted. Also, it is clear that as part of such comerce the receivers might sell and deliver gas so transported to local distributing companies free from unreasonable interference by the state. American Express Co. v. Iowa, 196 U. S. 133, 143, 25 Sup. Ct. 182, 49 L. Ed. 417; Oklahoma v. Kansas Natural Gas Co., 221 U. S. 229, 31 Sup. Ct. 564, 55 L. Ed. 716, 35 L. R. A. (N. S.) 1193; Haskell v. Kansas Natural Gas

Co., 224 U. S. 217, 32 Supt. Ct. 442, 56 L. Ed. 738.
* * * * * * * * *

"The companies received supplies which had moved in such commerce and then disposed thereof at retail in due course of their own local business. Payment to the receivers of sums amounting to two-thirds of the product of these sales did not make them integral parts of their interstate business. In fact, they lacked authority to engage by agent or otherwise in the retail transactions carried on by the local companies. Interstate commerce is a practical conception and what falls within it must be determined upon consideration of established facts and known commercial methods. * * "

There is no material distinction in the manner of delivery and sale in the Landon case from the one in this instance. In the former, the gas was sold by local distributing companies to local customers at the burner tips. In the present case there is no local distributing company but the gas is sold at the burner tips from the system of local mains at such times, in such quantities as the customers desire. There is no attempt to regulate the transportation of gas.

It does not follow then that the Public Service Commission of the State of New York upon an appropriate basis cannot regulate the selling price.

Unless the Public Service Commission has authority to proceed to investigate this matter of rates and fix the charges then concededly there is no other state authority.

The Interstate Commerce Commission acts have no application to this situation for the same expressly exclude the control of natural gas companies.

If then the Commission has no authority, there seems to

be no way in which any one can exercise the slightest control over this corporation.

If such is the law a most alarming condition is present. The thousands of consumers in the City of Jamestown depending upon this corporation for their fuel supply, must then submit to such tribute as the financial heads of this corporation may see fit to exact without basis founded upon values, cost of production or anything of substance other than the mere whim of that body of men. If this be true then there exists no power to require the gas company to supply gas or to prohibit it from charging a rate therefor which will make its use by the community prohibitive.

We submit that the decision in the Landon case is decisive and controlling upon the question of the Commission's jurisdiction.

CONCLUSION

The decision of the Court of Appeals proceeded upon the theory that a state regulation of the rates for gas to consumers from another state is a proper exercise of the police power of the state until Congress spoke on that subject.

The fallacy in that holding lies in the assumption that such distribution and sale is a part of the interstate commerce.

However, the court having correctly determined that the Public Service Commission of the State of New York has jurisdiction to fix the rates for gas sold within that State, this court will not disturb that holding, even though a wrong reason was adopted for such correct result.

Taylor vs. Thomas, 195 N. Y. 590, Affirmed 224 U. S. 73.

People ex rel White vs. Board of Aldermen, 157 N. Y. 431.

Ward vs. Hasbrouck, 169 N. Y. 407.

Trustees of East Hampton vs. Bowman, 136 N. Y. 521.

The decision of the Court of Appeals should be affirmed.

Respectfully submitted,

LOUIS L. THRASHER,
Special Counsel for City of Jamestown,
Alfred C. Davis and Others,
Defendants in Error.

OPINION

PENNSYLVANIA GAS COMPANY *v.* PUBLIC SERVICE COMMISSION, SECOND DISTRICT, OF THE STATE OF NEW YORK, ET AL.

ERROR TO THE SUPREME COURT OF THE STATE OF NEW YORK.

No. 330. Argued December 8, 9, 1919.—Decided March 1, 1920.

The transmission and sale of natural gas, produced in one State and transported and furnished directly to consumers in a city of another State by means of pipe lines from the source of supply in part laid in the city streets, is interstate commerce (p. 28); but, in the absence of any contrary regulation by Congress, is subject to local regulation of rates. P. 29. *Public Utilities Commission* v. *Landon*, 249 U. S. 236, distinguished.

225 N. Y. 397, affirmed.

THE case is stated in the opinion.

Mr. John E. Mullin, with whom *Mr. Marion H. Fisher* was on the briefs, for plaintiff in error:

The State has no power to regulate the rates in question, for such action necessarily imposes a direct burden and restraint upon interstate commerce.

The State in effect proposes to meet the plaintiff in error at the state line and to deny it freedom to import for sale a legitimate commodity of commerce except at a price to be fixed by the State. Nay more, the State apparently proposes not only to restrict the right of sale, but to compel the plaintiff in error to continue to import its Pennsylvania product for sale at the price fixed by the State. If such a regulation is not direct and substantial—if it does not restrain and burden interstate commerce, we can conceive of no action which would.

That a business is "regulated" when the return allowed on the business or the sale price of the commodity dealt in is fixed by governmental authority cannot be questioned, and such a regulation is far more substantial and burdensome than was the regulation of customers declared to be an unauthorized interference with commerce in the *Ticker Case*, 247 U. S. 105, or the inspection charge declared invalid by this court in *Western Oil Refg. Co.* v. *Lipscomb*, 244 U. S. 346. It is more direct than the state license fees upon agents selling and delivering interstate merchandise declared repugnant to the Constitution in *Stewart* v. *Michigan*, 232 U. S. 665; *Caldwell* v. *North Carolina*, 187 U. S. 622, and in *Rearick* v. *Pennsylvania*, 203 U. S. 507.

The rate or price received for the transportation and supply of the natural gas is the vital part of the transaction. Short of flat prohibition, there is no way to strike more directly at the heart of a commercial transaction than to fix the price that is to be received in it. See

Brown v. *Maryland*, 12 Wheat. 419, 447; *Leisy* v. *Hardin*, 135 U. S. 100, 108, 119–123; *Clark Distilling Co.* v. *Western Maryland Ry. Co.*, 242 U. S. 311, 328, 329; *Lyng* v. *Michigan*, 135 U. S. 161, 166; *Bowman* v. *Chicago & Northwestern Ry. Co.*, 125 U. S. 465, 507; Judson on Interstate Commerce, § 17; *West* v. *Kansas Natural Gas Co.*, 221 U. S. 255, 256.

The validity of state action does not rest upon the discretion or good judgment of the State, nor on the reasonableness of the regulation imposed. It depends solely on the question of power. *Brown* v. *Maryland*, 12 Wheat. 419, 439; *Western Union Tel. Co.* v. *Kansas*, 216 U. S. 1, 27; *Railroad Commission* v. *Worthington*, 225 U. S. 101, 107.

Federal functions may not be usurped under the police power, nor does the occupancy of highways by the plaintiff in error under local franchises authorize the State to regulate the price of gas moving in interstate commerce. *Leisy* v. *Hardin*, 135 U. S. 100, 108, 119–123; *Lyng* v. *Michigan*, 135 U. S. 161–166; *Wabash, St. Louis & Pacific Ry. Co.* v. *Illinois*, 118 U. S. 557.

Substantially parallel to the pipe line of the plaintiff in error, between the City of Warren, Pa., and the City of Jamestown, N. Y., an interurban trolley system is operated. This line is typical of many others, occupying city streets under local franchises. The State will hardly assert that it is able to regulate the interstate business or interstate rates of such trolley lines under the police power or because of the use of local franchises. The same rules and the same principles must be applied to the interstate business of the plaintiff in error.

This court has already held that the interstate gas business may not be regulated under the police power based on the use of highways. *West* v. *Kansas Natural Gas Co.*, 221 U. S. 229. See *Kansas Natural Gas Co.* v. *Haskell*, 172 Fed. Rep. 545.

The interstate natural gas business conducted by plaintiff in error is national, not local, in character, and the proposed state regulation thereof is not local in its operation. An interstate transaction requires national control whenever it is of such character that one State cannot control it without in effect extending its regulations into another State, or in effect assuming jurisdiction over property in another State, or leaving the transaction subject to conflicting regulations of different States.

The power of a State to enforce common-law duties, or like statutory duties, of public utilities engaged in interstate commerce does not extend to prescribing rates for interstate commerce. Subjecting interstate rates to control by a state commission is not the same as enforcing the common-law duty to serve at reasonable rates.

In fixing intrastate rates, for an interstate public utility, the State has no right to take into consideration the business of the company outside of the State, or base them on the value of the property outside the State. In fixing the gas rates in question, the State necessarily regulates the rate or return for the interstate transportation of the gas, and that is beyond its power.

Mr. Ledyard P. Hale for Public Service Commission, defendant in error.

Mr. Louis L. Thrasher for City of Jamestown *et al.*, defendants in error.

MR. JUSTICE DAY delivered the opinion of the court.

This writ of error brings before us for consideration the question whether the Public Service Commission of the State of New York has the power to regulate rates at which natural gas shall be furnished by the Pennsylvania Gas Company, plaintiff in error, to consumers in the city of Jamestown in the State of New York. The Court of

Appeals of New York (225 N. Y. 397) held that the Commission had such authority.

The statute of the State of New York, § 65, Public Service Commission Law, Laws 1910, c. 480, provides: "Every gas corporation, every electrical corporation and every municipality shall furnish and provide such service, instrumentalities and facilities as shall be safe and adequate and in all respects just and reasonable. All charges made or demanded by any such gas corporation, electrical corporation or municipality for gas, electricity or any service rendered or to be rendered, shall be just and reasonable and not more than allowed by law or by order of the commission having jurisdiction. Every unjust or unreasonable charge made or demanded for gas, electricity or any such service, or in connection therewith, or in excess of that allowed by law or by the order of the commission is prohibited."

Consumers of gas, furnished by the plaintiff in error in the city of Jamestown, New York, filed a complaint demanding a reduction of gas rates in that city. The Public Service Commission asserted its jurisdiction which, as we have said, was sustained by the Court of Appeals of New York.

The federal question presented for our consideration involves the correctness of the contention of the plaintiff in error that the authority undertaken to be exercised by the Commission, and sustained by the court, was an attempt under state authority to regulate interstate commerce, and violative of the constitutional power granted to Congress over commerce among the States. The facts are undisputed. The plaintiff in error, the Pennsylvania Gas Company, is a corporation organized under the laws of the State of Pennsylvania and engaged in transmitting and selling natural gas in the State of New York and Pennsylvania. It transports the gas by pipe-lines about fifty miles in length from the source

of supply in the State of Pennsylvania into the State of New York. It sells and delivers gas to consumers in the city of Jamestown, in the town of Ellicott, and in the village of Falconer, all in Chautauqua County, New York. It also sells and delivers natural gas to consumers in the cities of Warren, Corry and Erie in Pennsylvania.

We think that the transmission and sale of natural gas produced in one State, transported by means of pipe-lines and directly furnished to consumers in another State, is interstate commerce within the principles of the cases already determined by this court. *West* v. *Kansas Natural Gas Co.* 221 U. S. 229; *Haskell* v. *Kansas Natural Gas Co.*, 224 U. S. 217; *Western Union Telegraph Co.* v. *Foster*, 247 U. S. 105.

This case differs from *Public Utilities Commission* v. *Landon*, 249 U. S. 236, wherein we dealt with the piping of natural gas from one State to another, and its sale to independent local gas companies in the receiving State, and held that the retailing of gas by the local companies to their consumers was intrastate commerce and not a continuation of interstate commerce, although the mains of the local companies receiving and distributing the gas to local consumers were connected permanently with those of the transmitting company. Under the circumstances set forth in that case we held that the interstate movement ended when the gas passed into the local mains; that the rates to be charged by the local companies had but an indirect effect upon interstate commerce and, therefore, the matter was subject to local regulation.

In the instant case the gas is transmitted directly from the source of supply in Pennsylvania to the consumers in the cities and towns of New York and Pennsylvania, above mentioned. Its transmission is direct, and without intervention of any sort between the seller and the buyer. The transmission is continuous and single and is, in our opinion, a transmission in interstate commerce and there-

fore subject to applicable constitutional limitations which govern the States in dealing with matters of the character of the one now before us.

The general principle is well established and often asserted in the decisions of this court that the State may not directly regulate or burden interstate commerce. That subject, so far as legislative regulation is concerned, has been committed by the Constitution to the control of the Federal Congress. But while admitting this general principle, it, like others of a general nature, is subject to qualifications not inconsistent with the general rule, which now are as well established as the principle itself.

In dealing with interstate commerce it is not in some instances regarded as an infringment upon the authority delegated to Congress, to permit the States to pass laws indirectly affecting such commerce, when needed to protect or regulate matters of local interest. Such laws are operative until Congress acts under its superior authority by regulating the subject-matter for itself. In varying forms this subject has frequently been before this court. The previous cases were fully reviewed and deductions made therefrom in the *Minnesota Rate Cases*, 230 U. S. 352. The paramount authority of Congress over the regulation of interstate commerce was again asserted in those cases. It was nevertheless recognized that there existed in the States a permissible exercise of authority, which they might use until Congress had taken possession of the field of regulation. After stating the limitations upon state authority, of this subject, we said (p. 402): "But within these limitations there necessarily remains to the States, until Congress acts, a wide range for the permissible exercise of power appropriate to their territorial jurisdiction although interstate commerce may be affected. It extends to those matters of a local nature as to which it is impossible to derive from the constitutional grant an intention that they should go uncontrolled

pending Federal intervention. Thus, there are certain subjects having the most obvious and direct relation to interstate commerce, which nevertheless, with the acquiescence of Congress, have been controlled by state legislation from the foundation of the Government because of the necessity that they should not remain unregulated and that their regulation should be adapted to varying local exigencies; hence, the absence of regulation by Congress in such matters has not imported that there should be no restriction but rather that the States should continue to supply the needed rules until Congress should decide to supersede them. . . . Our system of government is a practical adjustment by which the National authority as conferred by the Constitution is maintained in its full scope without unnecessary loss of local efficiency. Where the subject is peculiarily one of local concern, and from its nature belongs to the class with which the State appropriately deals in making reasonable provision for local needs, it cannot be regarded as left to the unrestrained will of individuals because Congress has not acted, although it may have such a relation to interstate commerce as to be within the reach of the Federal power. In such case, Congress must be the judge of the necessity of Federal action. Its paramount authority always enables it to intervene at its discretion for the complete and effective government of that which has been committed to its care, and, for this purpose and to this extent, in response to a conviction of national need, to displace local laws by substituting laws of its own. The successful working of our constitutional system has thus been made possible."

The rates of gas companies transmitting gas in interstate commerce are not only not regulated by Congress, but the Interstate Commerce Act expressly withholds the subject from federal control. C. 309, § 7, 36 Stat. 539, 544.

The thing which the State Commission has undertaken to regulate, while part of an interstate transmis-